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In the Supreme Court

of the United States

No. 408, October Term, 1938

J. W. LAFE, Petitioner,

versus

JESS WILSON, JOHN MOSS AND MARION PARKS,

Respondents.

BRIEF OF PETITIONER

(ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.)

CHARLES A. CHANDLER, Esquire,
Muskogee, Oklahoma,
Counsel for Petitioner.

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In the Supreme Court of the United States

No. 460

OCTOBER TERM, 1938.

I. W. LANE, *Petitioner,*

vs.

JESS WILSON, JOHN MOSS AND MARION PARKS,

Respondents.

(ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.)

BRIEF OF PETITIONER ON WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petitioner, I. W. Lane, respectfully shows to this Honorable Court that this matter comes on for hearing herein upon Writ of Certiorari, allowed by this court on the 12th day of December, 1938 (R., p. 103), to review a judgment and order of the United States Circuit Court of Appeals for the Tenth Circuit, rendered on the 19th day of September, 1938, affirming a judgment of the United States District Court for the Eastern District of Oklahoma, rendered and entered by said latter court on the 19th day of April, 1937, in favor of said respondents herein and against the petitioner (R., p. 24). And said petitioner respectfully submits the following brief in the premises:

A.

OPINIONS *of the* COURTS BELOW.

Said opinion, judgment, and order of the Circuit Court of Appeals here sought to be reviewed are set forth in the record, pages 93-101; and said opinion is reported in Volume 98, Federal Reporter (2d) at page 980.

The judgment of said Federal District Court which was affirmed by said opinion and judgment of the said Circuit Court of Appeals is set forth in the record at pages 24-26; and opinion of the trial court is found in the record, pages 59-61. Said opinion of the trial court was not officially reported.

B.

STATEMENT *as to* JURISDICTION.

(1) This Cause Was Within the Original Jurisdiction of the Federal District Court.

It is provided by the second paragraph of Article VI, of U. S. Constitution, that said Constitution, and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land (Appendix hereto, page 71).

The 14th Amendment to the Federal Constitution provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor * * * deny to any person within its jurisdiction the equal protection of the laws (Appendix, p. 71). The 15th Amendment provides that the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude (Appendix, p. 72).

Pursuant to said constitutional provisions, the Congress duly enacted R. S. Secs. 2004 and 1979 (U. S. C. Title 8, Secs. 31 and 43; which are set forth in the Appendix, p. 72). Said R. S. Sec. 2004 provides, in effect, that all citizens of the United States who are otherwise qualified by law to vote, shall be entitled and allowed to vote at all elections, without distinction of race, color, or previous condition of servitude; and said R. S. Sec. 1979 affords a remedy, by action at law, suit in equity, or other proper proceeding for redress, for deprivation, under color of the laws of any State, of rights, privileges, or immunities secured by said Federal Constitution and laws.

By Section 24 of the Judicial Code (U. S. C. Title 28, Sec. 41) it is provided: *(1)* that the District Courts shall have original jurisdiction of all suits of a civil nature, at common law or in equity * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00, and *(a)* arises under the Constitution or laws of the United States; and by paragraph fourteen * * * (14), of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation under color of any law * * of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States (Appendix, p. 72).

By his petition filed below (R., p. 1-10), the petitioner, as plaintiff, sought $5,000.00 actual damages, and $5,000.00 punitive damages from the respondents, as defendants, on account of their having deprived him of his rights to register and to vote, it appearing that said respondents were acting under color of the Statutes of the State of Oklahoma, herein alleged to be unconstitutional.

Said District Court had original jurisdiction of the action. See: *Myers, et al.* v. *Anderson, et al* (1915), 238 U. S. 368, 59 L. ed. 1349.

It appeared, further, that all of the parties to said action, plaintiff and defendant, were citizens and residents of the Eastern Judicial District of Oklahoma. Venue of said action properly lay in the District Court of said Federal Judicial District. Judicial Code, Sec. 52; U. S. C., Title 28, Sec. 113.

(2) Upon Appeal, the Cause Was Within the Jurisdiction of the United States Circuit Court of Appeals for the Tenth Circuit.

In support of the jurisdiction of the United States Circuit Court of Appeals for the Tenth Circuit, of said cause upon appeal, this petitioner cites and relies upon Judicial Code, Sec. 128, as amended by the Act of Feb. 13, 1925; 28 U. S. C. A., Sec. 225 (a), First Subdivision.

(3) The Matter Herein Is Within the Jurisdiction of the Supreme Court of the United States.

To review the above mentioned final judgment and decision of said Circuit Court of Appeals, petitioner on November 7th, 1938, in accordance with the rules of this Honorable Court, filed herein his Petition for Writ of Certiorari and Brief in Support Thereof; and said petition was by this Court allowed on the 12th day of December, 1938 (R., p. 103). See: Rules of the Supreme Court of the United States, Rule No. 38; Sec. 240 (a) Judicial Code, as amended by the Act of Feb. 13, 1925; 43 Stat. 938; U. S. C., Title 28, Sec. 347 (a), Amended by Act of Feb. 13, 1925

It was contended by this petitioner, both in the District Court (R., p. 7) and in the Circuit Court of Appeals

(R., pp. 79-82), and is so contended in this court, that Article 3 of Chapter 29, of Oklahoma Statutes of 1931 (Vol. I, O. S. 1931, pp. 1645-1654), is unconstitutional, and violative of the 14th and 15th Articles of Amendment to the U. S. Constitution, and violative of the aforementioned R. S. Sec. 2004 (U. S. C., Title 8, Sec. 31). The pertinent sections of said Oklahoma Statute are set forth in the Appendix hereto, pp. 73-76).

The essential section of said laws, Sec. 5654, O. S. 1931; Vol. I, O. S. 1931, p. 1646, provides, in effect, that all qualified electors of said State of Oklahoma must be registered, according to said law, to be entitled to vote in any election held in said state; and said laws also provide, in effect, that all electors who voted at the general election held in said state in 1914 should have the right to vote, irrespective of whether such electors voting in 1914 should be registered under the 1916 act or not. Said election of 1914 in the State of Oklahoma was held under the amendment to the Constitution of Oklahoma, and the corresponding statutes, known as the "Grandfather Clause" (See said "Grandfather Clause", Sec. 4a of Art. III, of Oklahoma Constitution; Vol. II, O. S. 1931, p. 1407, Sec. 13450; Sec. 5643, O. S. 1931, Vol. I, O. S. 1931, p. 1641; Appendix hereto, p. 77). Said "Grandfather Clause" provided, in effect, that no person should be permitted to vote in said state unless such person should be able to read and write any section of the Constitution of the State of Oklahoma; but said "Grandfather Clause" provided further, that no person who was on January 1, 1866, or at any time prior thereto entitled to vote under any form of government, or who resided at that time in some foreign nation, and no lineal descendent of such person, should be denied the right to vote because of his inability *to so* read

and write sections of such Constitution. The said "Grandfather Clause" was by this Supreme Court held to be unconstitutional: *Guinn* v. *United States* (1915), 238 U. S. 347, 59 L. ed. 1340.

It is contended herein by petitioner that said registration law of 1916, requiring registration of petitioner, who did not vote in the 1914 election because he was prohibited by said "Grandfather Clause", while it exempted from registration those electors who voted at the 1914 election, held under the illegal "Grandfather" law, is, in constitutional and legal effect, identical with said "Grandfather Clause", and likewise, unconstitutional.

Said judgment and opinion of the Circuit Court of Appeals, affirming the judgment of the trial court and holding said registration law to be constitutional, was rendered on the 19th day of September, 1938 (R., p. 93); 98 Fed. (2d) 980. This petitioner, by petition therefor filed November 7th, 1938, made timely petition to this Honorable Court for Writ of Certiorari, which petition was allowed on the 12th day of December, 1938 (R., p. 103).

C.

STATEMENT *of the* CASE.

I.

PRELIMINARY STATEMENT.

The appeal to the Circuit Court of Appeals was prosecuted by appellant Lane, a Negro citizen of Wagoner County, Oklahoma, from judgment and order of the trial court, wherein, after trial, the court instructed the jury to return a verdict against said Lane as plaintiff and in favor of the defendants (R., p. 61). In the trial court petitioner Lane, as plaintiff, sought of the defendants (respondents herein) Five Thousand Dollars ($5,000.00) actual damages and a like sum as punitive damages for and on account of alleged deprivation of his right to register as an elector and, correlatively, of the right to vote, in violation of the Fourteenth and Fifteenth Articles of Amendment to the Constitution of the United States and of Federal laws enacted pursuant thereto, and under color of certain laws and statutes of the State of Oklahoma, alleged to be unconstitutional and void as violative of said Fourteenth and Fifteenth Amendments (See petition, R., pp. 1-11).

The trial court rendered a formal opinion (R., pp. 59-61), expressly holding that the Oklahoma Statute (O. S. 1931, Sec. 5654, Appendix, p. 73) involved and known as the Registration Law of 1916, was not violative of the Federal Constitution. The correctness of this holding and the constitutionality (under the State and Federal Constitutions) of said state statute constitute the fundamental question presented by the record herein.

This judicial inquiry is the culmination of more than twenty-five years of strife, constitutional enactment, legislation, and litigation involving the right of Negro citizens of the United States to vote in the State of Oklahoma.

Though in said state, and especially in Wagoner County therein, where the instant case arose, the Fifteenth Article of Amendment to the Constitution of the United States has been, as is by this case indisputably established, to all intents and purposes wholly repudiated, nullified, and ignored, the benign provisions and the just intent of said amendment, as well as those of the Fourteenth, are too well known to require or permit their repetition here. Further, by the sixth provision of section 3 of the Enabling Act (34 Stat. L. 269), under which it acquired the status of a state, the new State of Oklahoma entered into a sacred and solemn covenant with the United States never to "enact any law restricting or abridging the right of suffrage on account of race, color, or previous condition of servitude." (O. S. 1931, Vol. II, p. 1564.) Moreover, in *words* at least, the original constitution of the state (adopted in 1907) expressly adopted said Fifteenth Amendment (Okla. Const., Art. I, Sec. 6, Vol. II, O. S. 1931, p. 1386, Sec. 13411). But as to its colored citizens the state seems by these provisions, to have held the word of promise (of suffrage) to their ear, but to have broken it in the hope. Said original constitution, expressly espousing the tenets of the Fifteenth Amendment, was soon (in 1910) amended by that incongruous and cunning device known as the "Grandfather Clause" (Okla. Const., Art. III, Sec. 4a), which provided:

"13450 (Vol. II, O. S. 1931, p. 1407). *Grandfather Clause.*

"Sec. 4a. No person shall be registered as an elector of this State, or be allowed to vote in any election held herein, unless he be able to read and write any section of the Constitution of the State of Oklahoma; but no person who was, on January 1st, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such

person, shall be denied the right to register and vote because of his inability to so read and write sections of such Constitution. * * *"

Said Grandfather Clause seems significant in this inquiry as to the constitutionality of the Oklahoma Registration Law, for it is contended by petitioner that the former is the progenitor of the latter, that the latter is conceived for the same illegal purpose of circumventing the Fourteenth and Fifteenth Amendments, and that said Registration Law has the same nefarious operation and effect, *i.e.*, the disfranchisement of Negro citizens of the United States in violation of said Amendments and of Federal laws enacted pursuant thereto (See petition, R., pp. 7-10).

The result of the election (Aug. 2, 1910) purporting to adopt said Grandfather Clause was proclaimed by the Governor on October 6, 1910 (Vol. II, O. S. 1931, p. 1407, Sec. 13450, note); and on October 26th, twenty days later, in a most exhaustive, 30-page opinion, in proceedings in error in the State Supreme Court, said law was adjudged to be constitutional and valid. *Atwater* v. *Hassett, et al.*, 27 Okl. 292-321, 111 Pac. 802. Just how the said case arose, or how it could reach such speedy disposition does not appear. When, however, in another case, the question of the constitutionality of the now infamous Grandfather Clause was certified to the Supreme Court of the United States this court refused to be beguiled by weasel words or to be swayed by the sophistical reasoning of *Atwater* v. *Hassett, supra;* and it declared said corrupt law to be violative of the Fifteenth Amendment, unconstitutional, null and void. *Guinn* v. *United States* (1915), 238 U. S. 347, 59 L. ed. 1340.

The oppressive operation of the Grandfather Clause (as such) being terminated by the opinion in the aforementioned *Guinn* case, forthwith the Legislature of the State

was convoked into special session, and it enacted the Registration Law of 1916, under which the Negroes of Wagoner County, Oklahoma, in the position of petitioner Lane, have been wholly, completely, absolutely, and forever disfranchised.

The original Constitution of Oklahoma, sections 1 and 6, respectively, of Art. III (Vol. II, O. S. 1931, pp. 1406, 1408, Secs. 13446, 13452), prescribed the qualifications of electors, and authorized the Legislature, when necessary, to provide by law for the registration of electors. Immediately after said *Guinn* decision, outlawing disfranchisement in the State by ruse of the "Grandfather Clause", the Legislature in special session enacted the 1916 Statute, which was, ostensibly, for registration of electors; but was, in intent, operation and effect, as charged by Lane, the perpetuation of the Grandfather Clause in a new disguise of words (R., p. 23). Just how effectively the new Registration Law, together with its corrupt administration, has accomplished the nefarious design of the Grandfather Clause is glaringly demonstrated by the record in the instant case:

According to the last federal census, that of 1930, of Wagoner County's total population of 22,428, Negroes constituted 6,753, or slightly more than 30% (R., p. 38). As shown by the official registration records, there were registered in the County, during TWENTY YEARS next preceding trial of the instant case, exactly TWO Negro electors; and during the entire period since said Registration Law became effective, thirteen (13) Negro electors were registered in Wagoner County (R., p. 36), but it was not shown that a single one of these 13 ever in fact was permitted to vote. In fairness to said Registration Law, as well as to the respondents administering same, it should be admitted that during the registration of 1934, precinct

registrars registered fifty (50) Negroes; however, in an inquisition (partial transcript of hearing therein, R., pp. 64-74) under said laws, instigated by respondent County Judge John Moss and conducted by respondent Jess Wilson, County Registrar, the registration of *each* of said fifty Negroes was cancelled (R., pp. 36, 64-74).

II.

ABSTRACT OF RECORD.

(a) Pleadings.

(1) *Petition of Plaintiff* (R., pp. 1-11).

The petition of plaintiff Lane (petitioner) was filed in the United States District Court for the Eastern District of Oklahoma on October 27, 1934. It was therein alleged that said plaintiff was a Negro citizen of the United States and a duly qualified elector of Gatesville Precinct No. 1, of Wagoner County, Oklahoma; that the defendants Marion Parks, Jess Wilson and John Moss were, respectively, the Precinct Registrar, County Registrar, and County Judge for said county, all residing therein; and that the action involved a Federal question, namely, the right of suffrage of plaintiff under the Constitution of the United States, the Fourteenth and Fifteenth Amendments, and the laws of the United States enacted pursuant thereto. All necessary averments as to jurisdiction of the Federal Court were made.

By said petition it was alleged that on the 24th day of October, 1934, plaintiff, being then a duly qualified elector, applied to the defendant Marion Parks, plaintiff's precinct registrar, for registration as an elector, but that said defendant refused to register said plaintiff, solely on account of his race, color, and previous condition of servitude, said

refusal by said defendant being pursuant to a conspiracy for said purpose among said defendants, acting under color of certain statutes of the State of Oklahoma, especially O. S. 1931, section 5654, *supra*, said section being part of the Oklahoma Registration Law of 1916, which said Registration Law (Sec. 5654) plaintiff alleged to be unconstitutional, null and void, violative of the Fourteenth and Fifteenth Articles of Amendment to the Constitution of the United States and also violative of the laws of the United States, to-wit, R. S. Secs. 2004, 1979.

Plaintiff further alleged that said conspiracy to disfranchise the Negroes of Wagoner County had been in force and operation since the enactment of said 1916 Registration Law, and that said conspiracy had existed among and between said defendants and their respective predecessors in office.

Plaintiff alleged that he had been damaged in the sum of $5,000.00, and prayed for judgment in said sum for actual damages, and for like sum as punitive damages.

(2) *Joint Answer of Defendants Wilson and Parks* (R., pp. 11-16).

The defendants (respondents herein) Wilson and Parks filed their joint answer to petition of plaintiff, wherein they denied generally and specifically each and every allegation of said petition, except such as were specifically admitted in said answer (R., p. 11).

The defendants admitted that they were state officials, respectively, as alleged in petition of plaintiff. It was denied that a Federal question was involved. Said defendants denied any conspiracy, or any wrongful or illegal acts on their part, but alleged that their acts in the premises were under and pursuant to the Oklahoma Registration

Law of 1916, especially O. S. 1931, section 5654, which law defendants alleged to be constitutional and valid.

Said defendants in said answer further alleged that if it were true that said plaintiff was denied registration as an elector, said plaintiff had the right under said Registration Law of Oklahoma (O. S. 1931, Sec. 5654), to appeal to the District Court of Wagoner County to have reviewed the action of the precinct registrar; that the decision of the District Court of Wagoner County on said question was reviewable on appeal by the Supreme Court of the State; and that by his failure to prosecute proceedings in said state courts, as provided by said statute, said plaintiff Lane had waived his statutory (under aforementioned Acts of Congress) right herein mentioned, and should not be heard to complain in this action (R., p. 15).

It was further alleged that under said state statutes plaintiff Lane was not entitled to be registered at the registration period for said year 1934, same being a period of special registration for newly qualified electors, at which time plaintiff was not entitled to be registered, even though he possessed the necessary qualifications (R., p. 15).

The defendants contended, in effect, that relief should be denied plaintiff, because by his petition he sought inconsistent remedies, in that he prayed damages of the defendants for their refusal to register plaintiff under the Registration Laws of Oklahoma, which law plaintiff, as alleged in said answer, contended to be unconsitutional and void (R., p. 16).

It was further denied that plaintiff had been damaged, and it was prayed that his petition be dismissed (R., p. 16).

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(3) *Answer of Defendant John Moss* (R., pp. 17-18).

The defendant (respondent herein) John Moss filed his answer, denying the material allegations of the petition of plaintiff, as against said defendant. He denied that plaintiff had been damaged in sum of $5000.00, and prayed that the petition be dismissed and that said defendant have judgment for his costs (R., p. 18).

(4) *Replies of Plaintiff* (R., pp. 18-21, 22).

Plaintiff (petitioner) filed replies, respectively, to the above mentioned answers, said replies denying material allegations of new matter in said answers, thereby making up the issues involved.

***(b)* Evidence.**

(1) *Evidence of Plaintiff* (R., p. 27, *et seq.*)

L. W. LANE, plaintiff, testified in his own behalf substantially as follows:

That witness was approximately 70 years of age, was born in Alabama, and had lived in the town of Redbird, in the election precinct known as Gatesville Precinct No. 1, Wagoner County, Oklahoma, since 1908 (R., p. 27).

That witness voted in Alabama, and in Oklahoma in 1910 and in 1912, but that witness had not voted since 1912; he could not vote in 1914 because the Grandfather Clause was then in operation (R., p. 20); and he could not ever get registered under the Registration Law of 1916, although he has made application for registration during each registration period, commencing with that of 1916 (R., p. 28).

That during the registration period for the year 1916 witness made application for registration to one Workman,

his precinct registrar, and said Workman stated to plaintiff that he did not have the registration books—that he had returned them to some other officials (R., p. 28).

That in 1918 and also in 1920 witness made application for registration to one Mr. Atterberry, his precinct registrar at said time, who told witness on each occasion that said registrar did not have orders (from high officials) to register colored people (R., p. 28).

That, likewise, witness tried to register in 1922, again in 1924, and during each subsequent registration period (R., p. 28).

During these times when witness attempted to find the registrars he always had trouble locating them—they would usually be absent from home. Witness would have to return to their homes three or four times—sometimes about sun-up or sun-down. That when witness would locate the registrar the latter would tell him that he did not have any orders to register witness (R., p. 29).

In 1934 witness spoke to the County Registrar, Jess Wilson, about the refusal of precinct registrars to register witness. Witness had looked for a precinct registrar for three or four days, but could not find one. Then he inquired of said Wilson as to who had been appointed as registrar in plaintiff's precinct. Wilson replied that at that time he had not appointed a registrar for said precinct, but that he would appoint one within a day or two. A day or so later, after he had spoken to Wilson, witness ascertained that Parks was precinct registrar, and witness, accompanied by others, made application to Parks for registration. At said time the registration books had been open three or four days. Said books open twenty days before an election and close ten days before an election (R., p. 29).

That just before the general election of (November 6) 1934, and while the registration books were open, witness, accompanied by Washington Taylor, J. M. Jackson, E. T. Cullam, and Jim Ellis, went before Marion Parks, the precinct registrar of Gatesville Precinct No. 1, and demanded registration as an elector; that said Parks replied, "Well, I was instructed by the 'higher ups' [Jess Wilson, County Registrar, and John Moss, County Judge] not to register any colored people." Parks did not register plaintiff, nor give him a registration certificate (R., p. 29).

The testimony of plaintiff Lane concerning the refusal of Marion Parks, as precinct registrar, to register said Lane or those with him at the time mentioned, was corroborated by the testimony of J. A. Cullam (R., p. 30-32), by that of Washington Taylor (R., pp. 32-33), and by testimony of J. M. Jackson (R., pp. 33-34).

THE REGISTRATION RECORDS of Wagoner County, Oklahoma, for election years 1916 to 1936, inclusive, were introduced in evidence, and said records showed that in said Wagoner County, Negroes were registered as electors as follows (R., p. 36):

During the registration period of 1916, the first registration under the 1916 Registration Law, there were *eleven* Negro electors registered. There was no further registration of a Negro elector in said county until the year 1926, and in each of the years 1926 and 1928 there was registered *one* Negro as an elector. From 1928 down to 1934 there was *not a single* Negro elector registered in said County. In 1934, at the registration period of which Lane is specifically complaining, there were registered in said county fifty (50) Negro electors, but said County Registrar, Jess Wilson, struck from the record the names of each of said fifty who were so registered. To the introduction of

said Registration Records the defendants objected and saved exceptions (R., p. 36).

Plaintiff also introduced in evidence, as his "Exhibit No. 1", a transcript of proceedings had before defendant Jess Wilson, County Registrar, for cancellation of the registration of the aforementioned fifty Negro electors. To the introduction of this evidence defendants saved exceptions (R., pp. 36-37). The material parts of said transcript are set forth in the record herein at pages 64-74, and will be more particularly mentioned in this brief at pages 69-70.

PLAINTIFF'S "EXHIBIT NO. 2", U. S. Census Report for year 1930, was duly introduced in evidence (R., p. 38).

Said census report showed that the total population of Wagoner County, Oklahoma, in 1930 was 22,428, of whom 6,753 were Negroes; that Porter township in said county had a *white* population of 925, and a *Negro* population of 939; that Tullahassee township had a *white* population of 298, and a *Negro* population of 1,537; that Gatesville township had a *white* population of 1388, and a *Negro* population of 920; and that the town of Redbird, where plaintiff Lane resided (and of which he had been Mayor, R., p. 39), had a population of 218, all of whom were Negroes. The population of the other townships and towns of said Wagoner County, by races, is shown by said census report. The defendants objected to said evidence, and saved exceptions to the admission thereof (R., p. 37).

PLAINTIFF'S EXHIBIT NO. 3, Summary of Ages of Electors Registered in Gatesville Election Precinct No. 1, of Wagoner County, during the registration of 1934, as shown by the registration records, was introduced in evidence (R., p. 74).

This summary shows that during the registration period of 1934, when defendant Parks refused to register plaintiff Lane, said Parks, as registrar, registered 149 electors (all white), 18 of whose ages were 21 years, 18 were 22 years of age, and the ages of the others ranged from 2[illegible] years up to 60 years and over (R., p. 74).

Plaintiff announced that he did rest (R., p. 39).

(2) *Evidence on Behalf of Defendants* (R., p. 39, *et seq.*).

JAMES L. PACE, witness for defendants, testified substantially as follows (R., p. 39, *et seq.*):

That in 1916 witness lived in Gatesville Precinct No. 1, Wagoner County, Oklahoma, and was Precinct Registrar in said precinct for the entire year of 1916. That witness knew plaintiff Lane, but that said Lane did not in 1916 present himself to witness for registration (as an elector) (R., p. 40).

On cross examination, the witness James L. Pace testified that he did not register any Negroes in 1916; that no Negroes applied to witness in 1916 for registration; and that witness did not refuse any Negroes registration. That in 1916 witness had only a passing acquaintance with plaintiff Lane, and can remember distinctly that 21 years ago said Lane did not apply to witness for registration. That witness registered all Negro voters who applied in that precinct; but does not remember how many Negroes witness registered (R., p. 40).

The testimony of the witness James L. Pace to effect that he was Precinct Registrar of Gatesville Precinct No. 1, Wagoner County, during the year 1916 was corroborated by the testimony of five other witnesses for defendants (R., pp. 41-42).

J. L. Pace, witness for defendants, testified further on cross examination as follows (R., p. 43, *et seq.*):

That witness remembers registering a Mr. Puissner, with whom witness was well acquainted. That witness did not know how long Mr. Puissner had been living in said precinct, he having lived near witness all the while up to registration (in 1916). That in November, 1916, witness registered said Puissner who was 49 years of age, and a full-blooded Indian; and witness registered a Mr. Childers, white, 24 years of age (R., p. 44).

It was shown in open court that the ages of electors registered, as shown by Registration Records of Wagoner County, varied from 21 years up to 80 years (R., p. 44).

STOUT ATTERBERRY, witness for defendants, testified substantially as follows (R., p. 42, *et seq.*):

That witness lived in Gatesville Precinct No. 1, Wagoner County, Oklahoma, and had lived there for 25 years. That witness registered in 1916, before one Jim Pace as precinct registrar. That witness was not registrar in 1916, and does not believe Lane applied to witness for registration in said year.

On cross examination, the witness Stout Atterberry testified substantially as follows (R., p. 42, *et seq.*):

That witness was precinct registrar in 1920, just before the primary election, but that witness was not registrar for the entire period, said witness having served as registrar for *part* of said period. That the registration books were sent back to witness just before the general election, at which time witness was out working; and wife of witness advised him that the registration books had come, but that witness refused to serve further for that registration period. That on that night or the next night

plaintiff Lane and others came to home of witness while the registration books were there, to be registered, but that witness did not register Lane nor anybody else at said time. That the registration books were at the home of witness a day or two, but that someone got them while witness was absent. Witness understood later that one Workman got said registration books (R., p. 43).

JESS WILSON, defendant, testified for defendants substantially as follows (R., p. 45, *et seq.*):

That at time of trial witness lived in Tulsa County, but from the 3rd day of June, 1920, until 1935, witness lived in Porter, Wagoner County, Oklahoma. That in 1932 witness succeeded one Lawrence as County Registrar of Wagoner County, and served as such from 1932 until 1935.

That witness became acquainted with plaintiff Lane about 1920. That before the general election in 1934 Lane and three or four other persons came to witness, and inquired of witness as to who was going to be precinct registrar for Gatesville Precinct No. 1; and Lane inquired if witness had appointed one Lawrence; witness told Lane that said Lawrence had resigned as precinct registrar, but that witness would try to appoint another registrar on that day (R., p. 45).

That on the day following the above conversation with Lane witness appointed the defendant Marion Parks, as Precinct Registrar in Gatesville Precinct No. 1, northwest of Redbird, Oklahoma. That said Parks, a well known citizen of that community, served as registrar during that period of registration.

That witness did not in 1934, or at any other time, instruct any precinct registrar not to register Negro electors; nor did witness enter into any understanding to said effect.

That when witness gave Parks the registration books, witness told him that Mr. Moss (respondent) would instruct him in regard to the registration laws. That at said time Mr. Moss was County Judge of said Wagoner County (R., p. 46).

That witness did not have any conversation, nor agreement, nor understanding with Judge Moss as to the instructions the latter was to give Parks (R., p. 46).

On cross examination the defendant Jess Wilson testified (R., p. 46):

That while witness was County Registrar some Negroes were registered, but, at the request of Judge Moss and two others, witness, as County Registrar, struck said names (of registered Negroes) from the record. That some of the persons whose names were stricken from the registration record were registered by a man named Goddard, whom witness had appointed as (precinct) registrar. That in the majority of cases in appointing registrars they were given commissions, but that witness does not believe said Goddard had a commission, he having been appointed just by oral agreement (R., p. 46).

That the names stricken from the registration record, as aforestated, were stricken "because of a *higher decision* (by Jess Wilson) on the question of the legality of their being competent voters." (Italics and parentheses, ours.) (R., p. 46). Transcript of part of said proceedings before witness, as County Registrar, is set forth in record, pages 64-74.

JUDGE JOHN MOSS, defendant (respondent), testified on behalf of defendants substantially as follows (R., p. 47, *et seq.*):

That witness was County Judge of Wagoner County,

Oklahoma, and had been such since January, 1933; that witness was representative in the Legislature in 1910, becoming County Attorney of Wagoner County by appointment in December, 1919, that being the first time witness was County Attorney of Wagoner County. That witness was not County Attorney of Wagoner County in 1916. That witness did not as charged by plaintiff, enter into any conspiracy, understanding, or agreement with anyone to deprive plaintiff Lane or other Negroes in Gatesville Precinct No. 1 of their right or *alleged right* to vote. That witness did not ever instruct his co-defendant Marion Parks in any way whatsoever not to register plaintiff or other colored persons (R., p. 47).

That co-defendant Parks advised with witness about his duties as registrar, immediately prior to his service as such in 1934. That witness had a letter which had been turned over to him by one Biggerstaff, a newspaperman in Wagoner. Witness just read said letter to Parks, and when witness was through reading said letter to him he told Parks that said letter practically stated the law as witness understood it, and as witness has been interpreting it since 1920. This letter, from a Negro "Democratic editor" in Muskogee to said Mr. Biggerstaff, and purporting to give to the Oklahoma Registration Laws of 1916 an interpretation similar to that given them by the defendants (respondents) is set forth in the record at page 48.

MARION PARKS, defendant (respondent), testified as witness for defendants substantially as follows (R., p. 49, *et seq.)*:

That witness was Precinct Registrar in 1934 in Gatesville Precinct No. 1, in Wagoner County, Oklahoma. That witness knows plaintiff Lane. That witness did not state to Lane and others, on the occasion to which Lane referred

in his testimony, that witness had been instructed by the "higher ups" not to register the Negroes. That witness did not say anything of that sort, that witness did not tell Lane that witness had been instructed by Judge Moss or by Jess Wilson not to register Negroes. That nothing of that sort occurred (R., p. 49).

That witness remembered Judge Moss reading to witness from the letter mentioned in Moss' testimony. That witness did not remember the exact words had with Judge Moss in said conversation, but did remember inquiring of Judge Moss about registering people who had become 21 years of age, and Judge Moss stated to witness "You register all that have become twenty-one since last registration." That Judge Moss advised witness to register all whom he thought to be legal voters. That at said time witness did not have any understanding, agreement, conspiracy or anything of that sort with the defendants, nor with either of them, whereby it was understood that witness was to prevent Negroes from registering. That witness did not have any malice or ill feeling against these colored people. That witness was acting in good faith, honestly and fairly trying to follow the law, treating all alike, telling them the law, whether white or colored (R., p. 50).

On cross examination, the defendant Marion Parks testified substantially as follows (R., p. 50, *et seq.):*

That witness did register white people from 21 years of age up, the exact number, witness being unable to remember, nor does witness remember their ages, nor all of the people registered at that time. That witness did not register plaintiff Lane, because Lane had no papers showing that he had ever registered. That witness inquired of Lane if he had ever registered, to which Lane replied in the negative; and witness told Lane, "I can't

register you, if you have never registered, unless you have become 21 since the last registration." (R., p. 50). That witness asked the white people whom he registered the same question. That said white people had papers to prove that they were eligible voters. That the white electors registered by witness did not have certificates, they had proof they were eligible voters—they had witnesses to prove it. The basis of the eligibility was that they had been in the state one year, in the county six months, and in the township thirty days, witness meaning those electors who had just become 21 years of age and had no certificate of registration. Those over 21 had certificates from their precincts and they had voted. That witness registered 86 electors that proved that they had registered (R., p. 50).

That witness did not mean to tell the court and jury that every person over 21 years of age, whom witness registered, was a person who had a transfer—they had proved in different ways that they were legal voters. Some had lived in the precinct different lengths of time, but there were none that had lived in the precinct that had not registered since they moved in, since the last registration. All that witness registered in 1934, were those that had moved in since the last registration period. That those electors who moved in had to prove to witness that they were legal voters, and in other cases they had registration certificates, and exhibited them to witness (R., p. 51).

(3) *Rebuttal evidence of plaintiff* (R., p. 51).

I. W. LANE, plaintiff, testified on rebuttal that the statement of Mr. Parks to the effect that he (Parks) said nothing to witness about an order from the "higher ups" was false.

Both sides announced in open court that they did rest (R., p. 51).

(c) Proceedings on Verdict, Opinion of Trial Court, Motion for New Trial, and Judgment.

(1) Motion for a Directed Verdict in favor of the defendants and each of them, was by them made in open court (after argument and request by plaintiff for instructions), said motion of defendants was sustained, to which plaintiff objected and saved exceptions (R., pp. 52, 62).

(2) Request for Instructions to the jury was made by plaintiff in writing. Each separate written request for instruction made by plaintiff was upon the theory that the qualifications of an elector were those prescribed by the Oklahoma Constitution (Art. III, Sec. 1, Oklahoma Const.; O. S. 1931, Sec. 13446); whether there was a conspiracy among the defendants; and upon the question of damages (R., pp. 52-58); and that the Oklahoma Registration Law (Sec. 5654) violated the Fourteenth and Fifteenth Amendments. The trial court refused to give any of the instructions requested by plaintiff, to the refusal of each of which plaintiff objected and saved exceptions (R., pp. 52-58).

(3) Opinion of trial court was rendered by the judge in deciding said case (R., pp. 58-61). In its opinion the trial court stated "* * * The sole question pertinent to the determination of the issues in this case, whether section 5654, Compiled Statutes 1931, is a valid statute and constitutional under the Fourteenth and Fifteenth Amendments to the Constitution of the United States * * *" (R., p. 59). By said opinion the trial court found said statute to be constitutional and valid and, accordingly, directed the jury to return a verdict for the defendants and against plaintiff (R., p. 61). Such verdict was duly returned and filed in

open court (R., p. 61), to all of which plaintiff objected and saved exceptions.

(4) Motion for new trial was in due time and form filed by plaintiff, and therein were alleged errors according to the theory of the case as contended by plaintiff, hereinabove set forth (R., pp. 62-63). Said motion for new trial was (in journal entry) denied by the trial court, to which plaintiff objected and saved exceptions (R., p. 64).

(5) Judgment was entered in favor of the defendants and against plaintiff, to all of which plaintiff (this petitioner) objected and saved exceptions (R., pp. 24-26); and plaintiff in open court gave notice of his intention to appeal to the Circuit Court of Appeals.

(d) Proceedings to Perfect Appeal.

In the trial court, and at the same time of the rendition of final judgment, plaintiff filed in due and proper form his petition for appeal (R., pp. 77-78); assignment of errors and prayer for reversal (R., pp. 79-82), by said assignment of errors plaintiff, in effect, assigning the errors *specified* herein, *infra*, pages 28-29, and also bond upon appeal (R., pp. 82-83). In open court order was made allowing said appeal (R., pp. 83-84); the appeal bond was approved (R., p. 83); and citation was duly issued and in open court served upon the defendants (R., pp. 84-85).

The bill of exceptions in said court was duly prepared, settled and filed (R., pp. 26-76); and the appeal herein was duly docketed in the Circuit Court of Appeals, pursuant to 28 U. S. C., Secs. 225 (1); Judicial Code, Sec. 128 amended by Act of Feb. 13, 1925; and pursuant to the rules of said Court in such case made and provided.

(e) Opinion and Judgment of the Circuit Court of Appeals.

On September 19th, 1938, said United States Circuit Court of Appeals rendered its opinion, affirming the judgment of the trial court, and holding the aforementioned registration statutes of the State of Oklahoma not to be in violation of the Constitution of the United States (R., p. 93-101); and on said date said Circuit Court of Appeals rendered its judgment, to the effect aforestated (R., p. 101). To review said opinion and judgment of the Circuit Court of Appeals, this petitioner, on November 7th, 1938, filed in this court his Petition for Writ of Certiorari; which Writ of Certiorari was by this court granted on December 12th, 1938; and said cause is now before this Honorable Court on said Writ of Certiorari.

D.

SPECIFICATION of ERRORS.

The errors assigned by this petitioner upon appeal to the Circuit Court of Appeals, are set forth in the record at pages 79-82; and the errors specified in the Petition for Writ of Certiorari herein are to similar effect (Petition for Writ of Certiorari, p. 10). The effect of said assigned and specified errors, respectively, intended to be urged herein by respondent are herein specified as follows, to-wit:

I.

The opinion of the Circuit Court of Appeals herein is so irregular and patently erroneous, and said court in ignoring controlling decisions of this Supreme Court of the United States, so far departed from the accepted and usual course of judicial proceedings, as to warrant a reversal of the judgment of said Circuit Court of Appeals.

II.

It appearing from the face of the Oklahoma Registration Law of 1916, as well as from the operation of said law as disclosed by the record herein, that said law is an attempted revitalization of the illegal Grandfather Clause (held invalid by this Court in the *Guinn* Case); and that said Registration Law is the same invalid law in a new disguise of words, having the same discriminatory and unconstitutional intent, operation, and effect, and violative of the 15th Article of Amendment to the Constitution of the United States; the Honorable Circuit Court of Appeals for the Tenth Circuit erred in affirming the judgment of the trial court, and in holding and adjudging that said Registration Law is valid and not unconstitutional.

III.

The said Registration Law of the State of Oklahoma, as made and enforced by the State, abridges the

privileges and immunities of petitioner Lane and of other citizens of the United States of his color and similarly situated, and deny them the equal protection of the laws; said Registration Law is violative of the 14th Article of Amendment to the Constitution of the United States, and said issue was duly raised in said court; and said Honorable United States Circuit Court of Appeals for the Tenth Circuit erred in holding and adjudging said Registration Law to be valid and constitutional without in any manner passing upon said issue so made under the 14th Article of Amendment to the Constitution of the United States.

IV.

It appearing that petitioner Lane was duly qualfied as an elector under Section 1 of Article III of Oklahoma Constitution (Vol. II, O. S. 1931, p. 1406, Sec. 13446; Appendix hereto, p. 76) but that pursuant to said Oklahoma Registration Law of 1916, as enforced by respondents, said petitioner was forbidden to register as an elector, though so duly qualified, and for said reason said Registration Law violated said provision of said state Constitution; and alleged error to said effect was duly assigned in the Circuit Court of Appeals; and said Circuit Court of Appeals erred in holding said Registration Law to be valid and constitutional, without in any manner observing said issue so made under the state Constitution.

V.

Upon the trial there was adduced abundant evidence of a conspiracy between and among the respondents, acting pursuant to said state laws, in the deprivation from petitioner of his rights under the constitution and laws of the United States; and said Circuit Court of Appeals committed error in holding and adjudging that there was no conspiracy, said question being properly determinable by a jury, and not by the court; and in so doing the Circuit Court of Appeals violated the 7th Amendment.

E.

ARGUMENT.

PROPOSITION I.

The opinion of the Circuit Court of Appeals herein is so irregular and patently erroneous, and said court, in ignoring controlling decisions of this Supreme Court of the United States, so far departed from the accepted and usual course of judicial proceedings, as to warrant a reversal of the jud ment of said Circuit Court of Appeals.

It is charged in the petition of plaintiff (R., p. 9) that said Oklahoma Registration Law, Sec. 5654, O. S. 1931, is "an illegal and cunning attempt to achieve the illegal purpose sought by the grandfather clause and to evade the effect of the decision of the Supreme Court of the United States" in *Guinn* v. *United States, supra.* This contention is fully established, both by a careful comparison of said two laws (see them: Appendix, pp. 74, 77), and by consideration of the results they have, respectively, produced. Said Grandfather Clause purported to establish a universal literacy test, but exempted therefrom the favored class consisting of those (whites) who could vote on January 1, 1866, and their lineal descendants.

Said registration law, Sec. 5654, O. S. 1931, purports to require universal registration as a prerequisite to the right of suffrage, but exempts therefrom the same favored class, the white electors, who were favored by the Grandfather Clause, by continuing to those electors the advantage they enjoyed under the void grandfather law in effect at the time of the 1914 election.

In the opinion in the case of *Guinn* v. *United States, supra,* the Grandfather Clause was held unconstitutional, not because the State was without power to establish a lit-

eracy test, but because of the exemption from the literacy test of those coming within the classification of January 1, 1866.

Similarly, this petitioner has nowhere contended that the mere requirement of universal registration would violate any federal constitutional provision; but said petitioner did, and does, most emphatically insist that it is unconstitutional for the Oklahoma registration statute to require registration of those electors, who, like petitioner Lane, were duly qualified but were prevented by an unconstitutional law from voting at the 1914 election, permitting such registration within one ten-day period during a lifetime; and at the same time to exempt from registration those who enjoyed an illegal and unconstitutional advantage at said 1914 election.

The opinion of the Circuit Court of Appeals (R., p. 100) states with absolute finality:

> "Certainly there is nothing *on the face* of the registration statute that even tends to support appellant's claim of discrimination between white and Negro electors, * * *." (Italics ours.)

That the above observation (as to the "face" of the registration law) is of no significance in this judicial inquiry appears from the same opinion (R., p. 101):

> "It may be, and we take it as true, that inasmuch as the so-called grandfather clause in the Constitution of Oklahoma had not been declared void as violative of the Fifteenth Amendment until 1915 no Negroes voted at the 1914 election * * *."

And said observation is nothing more than a re-statement of the proposition wholly repudiated by the opinion of Mr. Chief Justice WHITE in the *Guinn* case, *supra*. Said the learned Chief Justice (238 U. S. 347, at p. 360, 59 L. ed. 1340, at p. 1346):

> "The real question involved, so the argument of the Government insists, is the repugnancy of the standard which the amendment makes, based upon the conditions existing on January 1st, 1866, because *on its face and inherently considering the substance of things, that standard is a mere denial of the restrictions imposed by the prohibitions of the 15th Amendment, and by necessary result re-creates and perpetuates the very conditions which the Amendment was intended to destroy.*" (Italics ours.)

And at page 364 of the U. S. Reporter, page 1348 of the L. ed.:

> "It is true it contains no express words of an exclusion from the standard which it establishes of any person on account of race, color, or previous condition of servitude, prohibited by the 15th Amendment, but the standard itself inherently brings that result into existence since it is based purely upon a period of time before the enactment of the 15th Amendment, and makes that period the controlling and dominant test of the right of suffrage."

What difference there may be between the Grandfather Clause and the registration law is a difference in form and phraseology—none in substance—the former established a standard based purely upon a period of time before the enactment of the 15th Amendment, and sought to perpetuate conditions prohibited by said Amendment; and the registration law established a standard based upon a period of time (1914) when said Amendment was flagrantly disregarded and violated, and sought to perpetuate said standard despite the mandate of the Supreme Court in said *Guinn* case, *infra*.

Not only is said registration law of 1916 shown to be, in legal and constitutional contemplation, identical with the Grandfather Clause, and its administration shown by

the record herein to have achieved a similar result, but said opinion of the Circuit Court of Appeals recites in support of said registration law the very reasoning offered in support of the Grandfather law itself. In the opinion of the Supreme Court of Oklahoma, purporting to uphold the original Grandfather Clause, *Atwater* v. *Hassett, et al.* (1910), 27 Okl. 292, at p. 310, this language was employed:

> "In *Pope* v. *Williams, et al.*, 193 U. S. 621, 24 Sup. Ct. 573, 48 L. ed. 817, Mr. Justice PECKHAM, in delivering the opinion of the court, said:
>
> "'* * * In other words, the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution.'"

And in the opinion of the Circuit Court of Appeals below (R., p. 100), this language is found:

> "In *Pope* v. *Williams*, 193 U. S. 621, the court said:
>
> "'In other words, the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution.'"

In said *Atwater-Hassett* opinion, at page 313 of 27 Oklahoma Reporter:

> "In practically every state of the Union, on January 1, 1866, persons were disqualified from voting who had been convicted of infamous crimes, unless such disqualification had been removed, etc. In addition, an alien residing in this country on January 1, 1866, neither having become a naturalized citizen nor having declared his intention to become a citizen of the United

States, was not entitled to vote in any of the states. * * * Such alien residing in the United States on January 1, 1866, neither being entitled to vote in the place of his residence nor under any organized government where he had previously resided or been a citizen of, and his decendants, would also be subject to this educational qualification, coming within the excluded class as of the date of January 1, 1866."

In the opinion of the Circuit Court of Appeals below (R., p. 101):

> "Under Section 5654 all who voted at the election in 1914 were placed on the registration books and certificates were issued to them by the registrars without applications therefor. It may be, and we take it as true, that inasmuch as the so-called grandfather clause in the Constitution of Oklahoma had not been declared void as violative of the Fifteenth Amendment until 1915 no Negroes voted at the 1914 election, but at least many of them became qualified electors prior to the registration period in 1916, and Section 5652 gave notice that no elector would be permitted to vote at any election unless he should register as provided by the act. *There were probably also some whites who were qualified to vote at the 1914 election who did not vote. They were on the same footing as to registration as were the qualified Negroes. There was no distinction between them.* Any elector, white or Negro, who applied and was denied registration, had the same right to carry the issue thus made to the Supreme Court for determination." (Italics ours.)

Said *Atwater* v. *Hassett* opinion was relied upon by the defendants in the *Guinn* case, *supra*, and it was wholly repudiated by the decision therein rendered by this Court. See note to said opinion, 59 L. ed. 1340, at page 1341. That this petitioner cited and relied upon said controlling *Guinn* opinion by this court appears from a recitation, in said opinion of the Circuit Court of Appeals, of the contention

of petitioner (R., p. 99). Thus, said opinion of the Circuit Court of Appeals tacitly follows an opinion of a state court, which state court opinion had been wholly repudiated by the decision of this Supreme Court of the United States; and said opinion of the Circuit Court of Appeals fails in anywise even to mention said *Guinn* decision which was directly in point and controlling, or any other respectable authority, and it fails in anywise to observe other decisions of this Court upon the same proposition. See also: *Myers* v. *Anderson* (1915), 238 U. S. 368, 59 L. ed. 1349; Supreme Court Rule 38, par. 3(b); 87 Univ. of Penn. Law Review, January, 1939, p. 348, discussing said opinion of the Circuit Court of Appeals hereunder reviewed, and citing authorities.

PROPOSITION II.

It appearing from the face of the Oklahoma Registration Law of 1916, as well as from the operation of said law as disclosed by the record herein, that said law is an attempted revitalization of the illegal Grandfather Clause (held invalid by this Court in the *Guinn* case); and that said Registration Law is the same invalid law in a new disguise of words, having the same discriminatory and unconstitutional intent, operation, and effect, and violative of the 15th Article of Amendment to the Constitution of the United States; the Honorable Circuit Court of Appeals for the Tenth Circuit erred in affirming the judgment of the trial court, and in holding and adjudging that said Registration Law is valid and not unconstitutional.

Point 1. *Said Section 5654, O. S. 1931, is by its legal effect violative of the 15th Amendment and violative of R. S. Sec. 2004; and the opinion of the Circuit Court of Appeals, holding said law to be constitutional and valid, is contrary to the decision of this court in the case of Guinn v. United States, supra.*

It appears that petitioner Lane was duly qualified as an elector, and actually voted in the State of Oklahoma prior to the Grandfather Clause (R., p. 27); that during the existence of said Grandfather Clause, and before it was invalidated by the decision in the *Guinn* case, *supra*, said petitioner, on account of said Grandfather Clause, was unable to vote (R., p. 28). It appears further that during every registration period since the enactment of said Registration Law of 1916, said petitioner has striven, unsuccessfully, to be registered (R., p. 28). The refusal of registration of petitioner for which refusal damages were sought in the instant case was made during the registration period, under state law, just prior to the general election of 1934, at which election members of the Congress of the United States, as well as state and local officers, were to be voted upon. Accordingly, there does not arise in this inquiry any question as to the applicability of Federal laws to said election and the registration pertaining thereto.

At the outset of any discussion of the constitutionality of the Oklahoma Registration Law of 1916, or of Section 5654 thereof, it is by this petitioner specifically admitted that the various states, so far as the Federal Constitution is concerned, have plenary power and jurisdiction in prescribing the qualifications of the electors, or in providing for their registration; the only limitation being that the states must not infringe the inhibitions of the 14th and 15th Articles of Amendment to the Constitution of the United States. This was specifically pointed out by Mr. Chief Justice WHITE in the opinion in *Guinn* v. *United States, supra;* and this proposition—both as to the extensive power of the states, and as to the inexorable effectiveness of the limitations imposed by said amendments—is too universally accepted by both bench and bar to require argument or to permit extended discussion.

Accordingly, petitioner admits that Sec. 5652, O. S. 1931, in and of itself, and considered independently of Secs. 5654 and 5657, is constitutional and valid, and does not in anywise violate either of the aforesaid amendments to the Constitution of the United States. Said Sec. 5652, provides;

> "5652. *Registration Mandatory.*
>
> "It shall be the duty of every qualified elector in this state to register as an elector under the provisions of this Act, and no elector shall be permitted to vote at any election unless he shall register as herein provided, and no elector shall be permitted to vote in any primary election of any political party except of the political party of which his registration certificate shows him to be a member." (Vol. I, O. S. 1931, p. 1646.)

Petitioner further admits that had said Sec. 5654 carried out the requirement of registration "of every qualified elector", and enforced the requirement that "no elector shall be permitted to vote in any election unless he shall register"—applying to all electors alike and providing for reasonable opportunity for registration—there would be no sound, constitutional objection to said Sec. 5654. But here comes the rub—there is buried down in the verbiage of said Sec. 5654 the following proviso, to-wit:

> "* * * And provided that it shall be the mandatory duty of every precinct registrar to issue registration certificates to every qualified elector who voted at the general election held in this state on the first Tuesday after the first Monday in November, 1914, without the application of said elector for registration, and, to deliver such certificate to such elector if he is still a qualified elector in such precinct and the failure to so register such elector who voted in such election held in November, 1914, shall not preclude or prevent such elector from voting in any election in this state * * *. Provided further, that each county election board in

this state shall furnish to each precinct election board in the respective counties a list of the voters who voted at the election in November, 1914, and such list shall be conclusive evidence of the right of such person to vote."

Sec. 5657, O. S. 1931, regulating registration, provides, in part, as follows:

"* * * Except in the case of a qualified elector who voted at the general election held in this state on the first Tuesday after the first Monday in November, 1914, in which case it shall be the mandatory duty of the precinct registrar to register such voter and deliver to such voter a registration certificate and the failure to so register such elector and to issue such certificate shall not preclude or prevent such elector from voting at any election in this State. * * *" (Vol. I, O. S. 1931, p. 1648.)

Sec. 1, of Article III, of the Constitution of Oklahoma prescribed the qualifications of an elector as follows:

"Section 1. The qualified electors of this State shall be citizens of the United States, citizens of the State, including persons of Indian descent (native of the United States), who are over the age of twenty-one years, and who have resided in the State one year, in the County six minths, and in the election precinct thirty days, next preceding the election at which such elector offers to vote. Provided, that no person adjudged guilty of a felony, subject to such exceptions as the Legislature may prescribe, nor any person, kept in a poorhouse at public expense, except Federal, Confederate and Spanish-American ex-soldiers or sailors, nor any person in a public prison, nor any idiot or lunatic, shall be entitled to register and vote." (Vol. I, O. S. 1931, p. 1406, Sec. 13446.)

When he applied to the respondent Parks for Registration, petitioner Lane was duly qualified as elector un-

der the above-quoted constitutional provision, and was "otherwise" qualified, under R. S., Sec. 2004; but said respondent Parks refused to register him because, as contended by the respondent, petitioner Lane had not registered during the ten-day period in 1916, as provided by said Section 5654; and because, as testified by petitioner and others (R., p. 29), Parks had orders from the "higher ups", Moss and Wilson, not to register Negroes. In other words, the purport of said Section 5654, as well as the contention of the respondents, seems to be that petitioner Lane, as well as other Negroes in Oklahoma circumstanced as he was, formerly disfranchised by the unlawful Grandfather Clause, was by the terms of said statute granted *only ten days in this life* within which to register and preserve the privilege of franchise; otherwise, he was to be disfranchised forever; while the electors *who voted in the election of 1914*, obviously *white*, for only whites could vote under the illegal Grandfather Law, could continue to vote without being registered at all.

The very statement of the monstrous proposition that a considerable element of the duly qualified electorate of a state was bound, by the terms of a state statute, to register within a single ten-day period, under penalty of being *forever disfranchised;* while others, *without* any registration, had preserved to them, by the terms of the same statute, the privilege of franchise forever, would arouse suspicion. Why would the state require any elector, "otherwise" duly qualified, to register within a single, ten-day period, under the penalty of being forever disfranchised?

When to this arbitrary discrimination, patent upon the face of the statute, is added the cunning, deceitful and vexatious manner in which it is administered—precinct registrars playing "hide-and-go-seek" with Negro electors seeking registration (R., p. 29); the colored electors having

no definite way of knowing who is the precinct registrar (R., pp. 43, 45); county registrars failing or delaying to appoint precinct registrars in precincts with considerable Negro electors, or failing to provide them with registration books (R., p. 45); or appointing registrars who refuse to act (R., p. 45); or registrars requiring orders from "higher-ups" (those in charge of the corrupt political machine) before registering Negroes (R., p. 29)--with the entire "machinery"—or machination—in actual operation, there can be no doubt in any just mind that said law infringes the inhibitions of the 15th Amendment, and also those of the 14th.

This case is, *mutatis mutandis*, and in legal and constitutional contemplation, identically the same case before the Supreme Court of the United States in *Guinn* v. *U. S.* (Okl. 1915), 238 U. S. 347, 59 L. ed. 1340, 1347; and the principles announced by the learned Chief Justice in that opinion are imperatively applicable to this case and compellingly dispositive of the issue it presents. Said the learned Chief Justice in the opinion of this Court in the *Guinn* case, *supra:*

> "The inquiry, of course, here is, does the amendment as to the particular standard which this heading embraces involve the mere refusal to comply with the commands of the 15th Amendment as previously stated? This leads us, for the purpose of the analysis, to recur to the text of the suffrage amendment. Its openings sentence fixes the literacy standard which is all-inclusive since it is general in its expression and contains no word of discrimiantion on account of race or color or any other reason. This, however, is immediately followed by the provisions creating the standard based upon the condition existing on January 1, 1866, and carving out those coming under that standard from the inclusion in the literacy test which would have con-

trolled them but for exclusion thus expressly provided for. The provision is this:

> 'But no person who was, on January 1st, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such Constitution.'

"We have difficulty in finding words to more clearly demonstrate the conviction we entertain that this standard has the characteristics which the government attributes to it than does the mere statement of the text. It is true it contains no express words of an exclusion from the standard which it establishes of any person on account of race, color, or previous condition of servitude, prohibited by the 15th Amendment, but the standard itself inherently brings that result into existence since it is based purely upon a period of time before the enactment of the 15th Amendment, and makes that period the controlling and dominant test of the right of suffrage. In other words, we seek in vain for any ground which would sustain any other interpretation but that the provisions recurring to the conditions existing before the 15th Amendment was adopted and the continuance of which the 15th Amendment prohibited, proposed by in substance and effect lifting those conditions over to a period of time after the Amendment, to make them the basis of the right to suffrage conferred in direct and positive disregard of the 15th Amendment. And the same result, we are of opinion, is demonstrated by considering whether it is possible to discover any basis of reason for the standard thus fixed other than the purpose above stated. We say this because we are unable to discover how, unless the prohibitions of the 15th Amendment were considered, the slightest reason was afforded for basing the classification upon a period prior to the

15th Amendment. Certainly it cannot be said that there was any peculiar necromancy in the time named which engendered attributes affecting the qualification to vote which would not exist at another and different period unless the 15th Amendment was in view." *Guinn* v. *U. S.* (1915), 238 U. S. 347, 59 L. ed. 1340, at p. 1347.

The Oklahoma Constitution, Article III, Sec. 6 (Vol. II, O. S. 1931, p. 1408, Sec. 13452), provided:

> "Sec. 6. In all elections by the people the vote shall be by ballot and the Legislature shall provide the kind of ticket or ballot to be used and make all such other regulations as may be necessary to detect and punish fraud, and preserve the purity of the ballot; and may, when necessary, provide by law for the registration of electors throughout the state or in any incorporated city or town thereof, and, when it is so provided, no person shall vote at any election unless he shall have registered according to law."

Said Grandfather Law having been declared violative of the 15th Amendment, unconstitutional and invalid; in the *Guinn* case, *supra*, the legislature of the state seemed to consider that the proper way, under the above quoted state constitutional provision, to keep the ballot "pure" was (as it had been under the Grandfather Law) to keep it "white". Accordingly, in special session, it enacted the present Registration Laws of 1916, declaring an emergency and providing that said law should become effective immediately (Vol. I, O. S. 1931, p. 1647). The heart and essence of said registration laws, so far as the present question of constitutionality is concerned, is embodied in Sec. 5654, Vol. I, O. S. 1931, p. 1646, set forth in full in Appendix hereto, page 74, and this entire controversy centers around the question whether said Sec. 5654 is unconstitutional, as violating the 14th and 15th Amendments to the Consti-

tution of the United States, and further, whether said section is an unwarranted and unconstitutional (under the State Constitution) restriction of the qualification of an elector, as provided by Section 1, Article III of the State Constitution (Vol. II, O. S. 1931, p. 1406, Sec. 13446; Appendix, p. 76). The question of the validity of said section under the State Constitution will be discussed in this brief under Proposition IV, *infra*, page 59.

In legal and constitutional contemplation, Sec. 5654 is identical with the original Grandfather Clause—neither by express terms discriminated against the Negro by referring to color. Each purported to establish a standard, which standing alone, would be valid—the Grandfather Law imposing a literacy test; and the 1916 law requiring universal registration. Each purported to exempt from the pretended universal standard a preferred element of the electorate—the Grandfather Clause exempted those who could vote on January 1st, 1866, and their descendants, etc., in other words, those who had never been under slavery, those who were white; Sec. 5654 exempted those who had voted in 1914, in other words, those who had never been disfranchised by the Grandfather Law, those who were white. So far as the right of suffrage of Negroes was concerned, the Grandfather Clause perpetuated the disabilities of slavery, despite the 15th Amendment: Sec. 5654 sought to perpetuate the disability of the Grandfather Law—to bring the disability of slavery down to date, despite the decision of the Supreme Court of the United States in the case of *Guinn* v. *U. S.*, *supra*. Furthermore, if six thousand seven hundred Negroes of a county, its entire Negro population, have been wholly disfranchised for twenty years, what difference does it make under the 15th Amendment to the Constitution of the United States, whether one calls it a Grandfather Law or a Registration Law!

The inhibitions of the 15th Amendment are "leveled at the thing, not the name". *In re: Tiburcio Parrott* (C. C. D. Calif. 1880), 1 Fed. 481, p. 515, J. SAWYER.

This law of the State of Oklahoma, to-wit Sec. 5654, O. S. 1931, as well as the result its administration has achieved, as disclosed by the record herein, is condemned by a constitutional principle uniformly declared by the Supreme Court of the United States, and also by other courts, ever since the adoption of the 15th Amendment:

Slaughter-House Cases (1872), 83 U. S., 16 Wall. 36, 21 L. ed. 394, opinion by Mr. Justice MILLER;

U. S. v. *Reese, et al.* (1876), 92 U. S. 214, 23 L. ed 563, opinion by Mr. Chief Justice WAITE;

Neal v. *Delaware* (1881), 103 U. S. 370, 26 L. ed. 567, opinion by Mr. Justice HARLAN;

In re: Yarbrough (1884), 110 U. S. 651, 28 L. ed. 274, opinion by Mr. Justice MILLER;

Guinn v. *U. S., supra* (1915), 238 U. S. 347, 59 L. ed. 1340, opinion by Mr. Chief Justice WHITE;

Anderson, et al. v. *Myers, et al., supra* (C. C. D. Md. 1910), 182 Fed. 223, opinion by D. J. Morris;

Myers, et al. v. *Anderson, et al., supra* (1915), 238 U. S. 368, 59 L. ed. 1349, opinion by Mr. Chief Justice WHITE;

West v. *Bliley, et al., supra* (D. C. Va. 1929), 33 Fed. (2d) 177, opinion by D. J. Groner;

Bliley, et al. v. *West, supra* (C. C. A. 4th, 1930), 42 Fed. (2d) 101, opinion by C. J. NORTHCOTT;

Nixon v. *Herndon, et al.* (1927), 273 U. S. 536, 71 L. ed. 759, opinion by Mr. Justice HOLMES.

Point 2. *This case is not within the doctrine of the case of Giles v. Harris, et al. (1903) 189 U. S. 475, 47 L. ed. 909.*

In their answer (R., p. 16), and in the courts below, respondents urged the patently specious argument—that petitioner is inconsistent in insisting upon the right to register under the Oklahoma Registration Law, while, at the same time, he is contending that the said law is unconstitutional and invalid. Restated, the argument is that if said law is unconstitutional, as contended by petitioner, it has never had any legal existence and petitioner never had any legal right to be registered; and if petitioner did not have a legal right to be registered, he has no legal complaint against respondents on account of the denial by them of registration. There are many answers to this illogical and sophistical contention:

First, the respondents seek thereby to play hard and fast, to blow hot and cold at the same time. They refuse to take the position that said law is either constitutional or unconstitutional;

Secondly, in urging said defense the respondents wholly ignore the fact that under the 15th Amendment and R. S. 2004, as well as under Sec. 1 of Art. III of the State Constitution, and independently of the cunning provisions of the state law or their amphibolous construction thereof, petitioner had the right to vote; and,

Finally, and conclusively, this Supreme Court of the United States has wholly repudiated the identical proposition. *Myers, et al.* v. *Anderson, et al., supra* (1915), 238 U. S. 368, 59 L. ed. 1349.

Said case of *Myers* v. *Anderson, supra,* was decided by this court on the same day on which was rendered the opinion in the *Guinn* case, *supra;* and the opinion therein

is directly in point and controlling on the point here under discussion. Said the learned Chief Justice (238 U. S., at p. 382; 59 L. ed. at p. 1355):

> "But it is argued even although this result be conceded, there nevertheless was no right to recover, and there must be a reversal since, if the whole statute fell, all the clauses providing for suffrage fell, and no right to suffrage remained, and hence no deprivation or abridgment of the right to vote resulted. But this, in a changed form of statement, advances propositions which we have held to be unsound in the *Guinn* case. The qualification of voters under the Constitution of Maryland existed and the statute which previously provided for the registration and election in Annapolis was unaffected by the void provisions of the statute which we are considering. The mere change in some respects of the administrative machinery by the new statute did not relieve the new officers of their duty, nor did it interpose a shield to prevent the operation upon them of the provisions of the Constitution of the United States and the statutes passed in pursuance thereof. The conclusive effect of this view will become apparent when it is considered that if the argument were accepted, it would follow that although the 15th Amendment by its self-operative force, without any action of the state, changed the clause in the Constitution of the State of Maryland conferring suffrage upon 'every white male citizen' so as to cause it to read 'every male citizen', nevertheless the Amendment was so supine, so devoid of effect, as to leave it open for the legislature to write back by statute the discriminating provision by a mere changed form of expression into the laws of the state, and for the state officers to make the result of such action successfully operative.
>
> "There is a contention pressed concerning the application of the statute upon which the suits were based to the acts in question. But we think, in view of the nature and character of the acts, of the self-operative

force of the 15th Amendment, and of the legislation of Congress on the subject, that there is no ground for such contention."

Moreover, it is apparent that the above specious argument of respondents emanated from a misconception or attempted distortion of the opinion rendered by this court in the case of *Giles* v. *Harris* (1903), 189 U. S. 475, 47 L. ed. 909, wherein the great Justice HOLMES ruled that in a proceeding in equity, wherein petitioner prayed the court to declare the entire election law of the state to be unconstitutional, the court could not so declare the law unconstitutional, and at the same time enforce it by a mandatory decree. In the opinion in said cause Mr. Justice HOLMES said (189 U. S., at p. 485, 47 L. ed., at p. 911):

> "On these assumptions we are not prepared to say that an action at law could not be maintained on the facts alleged in the bill. Therefore, we are not prepared to say that the decree should be affirmed on the ground that the subject-matter is wholly beyond the jurisdiction of the Circuit Court. *Smith* v. *McKay*, 161 U. S. 355, 358, 359, 40 L. ed. 731, 16 Sup. Ct. Rep. 490."

Point 3. ***The fact that the Oklahoma Registration Law provided some purported judicial remedy in the state courts for wrongful denial of registration did not affect petitioner's right to damages under R. S., Sec. 1979, nor impair the jurisdiction of the Federal Court over this action for damages under said Federal Statute.***

The above-stated proposition is so well settled and so well known to the bench and bar that merely to state it would appear redundant had not the respondents so earnestly urged the contrary in the courts below, and had not the opinion of the Circuit Court of Appeals below (R., p. 101), so sparse of reason or authority, seemed to accept

said unfounded contention of respondents as sound. Said erroneous position of respondents seems to be based upon a dictum in the opinion rendered by the Fifth Circuit Court of Appeals in the case of *Trudeau* v. *Barnes* (1933), 65 Fed. (2d) 563, where it was stated:

> "We cannot say, and refuse to assume, that, if plaintiff had pursued the administrative remedy that was open to him he would not have received any relief to which he was entitled. At any rate, before going into court to sue for damages, he was bound to exhaust the remdey afforded him by the Louisiana Constitution." Citing: *First National Bank of Greeley* v. *Board*, 264 U. S. 450, 68 L. ed. 784; *First National Bank* v. *Geldhart* (C. C. A. 5), 64 Fed. (2d) 873.

While said *Trudeau-Barnes* case, *supra*, bears a superficial similarity to the *Myers-Anderson* case, *supra*, as well as to the instant case, a casual analysis of said *Trudeau-Barnes* opinion will reveal that it is to each of said other cases as antipodal as the poles. The provisions in the Louisiana Constitution (concerning registration) involved in the *Trudeau-Barnes* case *appeared* similar to the law involved in the *Myers-Anderson* case, *supra*, in that each established a literacy test for suffrage; and it *appeared* similar to the instant case because there the plaintiff, a Negro, sought damages under R. S. Sec. 1979, just as petitioner seeks herein. There the similarity ended: it appears from the opinion in said case that there were not sufficient allegations of any discriminatory administration of the law in question in violation of the 15th Amendment, and, though given leave to amend to cure said defect, plaintiff declined so to amend his complaint. The constitutional provision involved in said *Trudeau-Barnes* case did not provide for any exemption to any class of electors (as was provided in the Grandfather Clauses of Oklahoma and

Maryland or as is involved in the Oklahoma Registration Law of 1916), nor was there any attempt at classifying the electors; and said opinion expressly, and pointedly distinguished said Louisiana law from such other laws, in the following words:

> That said Louisiana law was "essentially different from the Grandfather Clause of the Oklahoma Constitution which was held void in *Guinn* v. *United States*, * * * and the Maryland statute which was under consideration in *Myers* v. *Anderson*, * * *."

Further, if the federal courts should accept the view that the provision by a state statute of a judicial review in the state court of a wrongful refusal of the exercise of the right of suffrage would divest the federal courts of jurisdiction of such a controversy, then the 15th Amendment, as well as R. S. Secs. 2004, and 1979, would be mere nullities. Indeed, it is very rare that any state statute designed to violate the 15th Amendment to the Constitution of the United States fails to provide some purported judicial remedy in the state courts in such case. Such a remedy was provided by the constitutional provisions under scrutiny in said *Trudeau-Barnes* case, but the federal court assumed jurisdiction, and proceeded to determine the validity of the state constitutional provisions in question. Likewise, in the case of *Giles* v. *Harris*, *supra*, by the provisions of the Alabama Constitution (189 U. S. at p. 484; 47 L. ed. at p. 911):

> "An appeal is given to the county court and supreme court if registration is denied."

Yet, Mr. Justice HOLMES, speaking for the Supreme Court, refused to decide the case on the ground that the subject-matter was wholly beyond the jurisdiction of the federal court, and said case was disposed of on its merits. The registration law of the State of Maryland, involved in the

Myers-Anderson case, *supra*, specifically provided (Annotated Code of Maryland, Art. III, Sec. 27) that any person aggrieved by any board of register in refusing to register him as a qualified elector should have the right to an immediate state judicial hearing of the matter; yet, it was held that the federal court had jurisdiction, and this court proceeded to declare said registration law unconstitutional, although it did not appear that the plaintiff there had availed of said state remedy. And the registration statutes of the State of South Carolina, involved in the case of *Wiley* v. *Sinkler* (1900), 179 U. S. 58, 47 L. ed. 84, provided for a review in the state courts in such cases, and the federal courts assumed jurisdiction of an action for damages and proceeded to dispose of the case on its merits, although it did not appear that any resort had been had to such state remedy.

Moreover, the cases cited in said dictum in said *Trudeau-Barnes* case do not sustain the position of respondents here: *The First National Bank* v. *Board* case (cited in *Trudeau* v. *Barnes*, *supra*, page 48) merely held that a national banking corporation, in an effort to avoid taxation by the state of its shares of stock, not having applied to any of the tax authorities to reduce the assessment on its property or correct the alleged inequalities, prior to the final levy of the tax, and having paid said tax under protest, could not maintain an action in the federal court to recover such tax. And the *First National Bank* v. *Geldhart* case, cited in said *Trudeau-Barnes* opinion, merely held that a property owner who had already instituted, and was prosecuting, an appeal, under *administrative* proceedings provided by a state statute, could not, while prosecuting such *administrative* appeal, prosecute in a federal court of equity a suit to enjoin the collection of taxes involved. This latter ruling was obviously sound for

the reasons stated in said opinion: *(1)* the federal action was premature; and *(2)* plaintiff had an adequate remedy at law by paying the tax (after availing of the administrative remedy) under protest and seeking its recovery in an action at law.

True, this court denied Writ of Certiorari to review the opinion in said *Trudeau-Barnes* case, but such refusal does not in anywise amount to judicial approval by this court of the views expressed in said opinion. See: Revised Rules of Supreme Court of United States, Rule 38; *Hamilton Brown Shoe Co.* v. *Wolfe Bros. & Co.* (1916), 240 U. S. 251, 60 L. ed. 629.

And it may be observed that the remedy sought to be availed of by the petitioner here, namely, damages under R. S. Sec. 1979, is radically different from the purported remedy provided by said state statute, O. S. 1931, Sec. 5654. While said state statute purports to provide for a judicial inquiry as to the right of an elector to be registered, it does not in any wise provide for damages where the elector is wrongfully refused registration. The remedies provided, respectively, by the state statute, and by R. S. Sec. 1979, are radically different. Thus, where a plaintiff, who had in the state court unsuccessfully sought writ of mandamus to compel the registration officers to register him, subsequently instituted action under R. S. Sec. 1979 and in the federal court for damages, the federal court refused to give any effect to the judgment in the state court, on plea of *res judicata*, for the reason, as stated by C. J. NORTHCOTT in the opinion in *Bliley, et al.* v. *West* (C. C. A. 4, 1930), 42 Fed. (2d) 101, affirming *West* v. *Bliley, et al.* (D. C. Va. 1929), 33 Fed. (2d) 177:

> "The precise issue here involved is different from that in the mandamus suit." Citing, *Myers* v. *International Co.* (1923), 263 U. S. 64, 68 L. ed. 165.

Even where an Arkansas statute specifically provided for a state remedy, and provided that such remedy in the state courts should be exclusive to the jurisdiction of the federal courts, this court held that a federal court in a proper case had jurisdiction, even though no effort had been made to avail of said state remedy. *Chicot County, Arkansas* v. *Sherwood, et al.* (1893), 148 U. S. 529, 37 L. ed. 546. See also: *Davis* v. *Wallace* (1922), 257 U. S. 478, 66 L. ed. 325.

Thus, it appears that the failure of petitioner Lane to seek relief in the Courts of Wagoner County, or in the Supreme Court of Oklahoma, is immaterial to a disposition of this cause by this court.

Point 4. Sec. 5654, O. S. 1931, is violative of the 15th Amendment to the Constitution of the United States and R. S., Sec. 2004, because it is here shown that its actual administration achieves a result interdicted by said Amendment and by said Congressional Act.

No one can deny that the purposes of said 15th Amendment was to secure to Negro citizens the right of suffrage, on equal terms with other citizens, and free from discrimination by the states. *West* v. *Bliley, et al., supra,* 33 Fed. (2d) 177, 178, and authorities there cited; and also the authorities cited under Point 1, next above. It is impossible to imagine a situation, achieved by the actual administration of a state law, more flagrantly violative of said Amendment than that depicted by the record in this case.

It is a well established principle of constitutional construction that in determining the constitutionality of a state statute the court will consider its effect in actual operation, as well as its terms.

—*Henderson* v. *Mayor of New York, etc., et al.* (1876), 92 U. S. 259, 23 L. ed. 543, opinion by Mr. Justice MILLER;

Yick Wo v. *Hopkins* (1886), 118 U. S. 356, 30 L. ed. 220, opinion by Mr. Justice MATTHEWS;

Minnesota v. *Barber* (1890), 136 U. S. 313, 34 L. ed. 455, opinion by Mr. Justice HARLAN;

Truax v. *Raich* (1915), 239 U. S. 33, 40, 60 L. ed. 131, 135, opinion by Mr. Justice HUGHES.

To the contrary, it seems, the respondents rely upon the dictum of District Judge M. J. Cochran in *Grainger* v. *Douglas Park, etc.* (C. C. A. 6th, 1906), 148 Fed. 513 (See: contention of counsel, R., p. 35). It would seem superfluous here to attempt by argument or citation of authority to prove that it takes more than a dictum by a District Judge to overrule the well established, and universally accepted doctrine of *Yick Wo* v. *Hopkins, supra;* however, see: *Mugler* v. *Kansas* (1887), 123 U. S. 623, 31 L. ed. 205; *Traux* v. *Corrigan* (1921), 257 U. S. 312, 324, 66 L. ed. 254, 259; and *Sioux City Bridge Company* v. *Dakota County, Nebraska* (1923), 260 U. S. 441, 67 L. ed. 340.

PROPOSITION III.

The said Registration Law of the State of Oklahoma, as made and enforced by the State, abridges the privileges and immunities of petitioner Lane and of other citizens of the United States of his color and similarly situated, and deny them the equal protection of the laws; said Registration Law is violative of the 14th Article of Amendment to the Constitution of the United States, and said issue was duly raised in said court; and said Honorable United States Circuit Court of Appeals for the Tenth Circuit erred in holding and adjudging said Registration Law to be valid and constitutional without in any manner passing upon said issue so made under the 14th Article of Amendment to the Constitution of the United States.

Though it was properly assigned in the Circuit Court of Appeals that said registration law of Oklahoma was violative of the 14th Amendment (R., pp. 1, 7, 53, 80), the opinion of said court fails in any manner even to mention said issue or said amendment.

There formerly prevailed in some quarters the erroneous view that the 14th Amendment did not in any way restrain the authority of the state in regulating suffrage. See opinion in *Cofield* v. *Farrell, et al.* (1913), 38 Okl. 608, at p. 613, 134 Pac. 407. At the present time, however, there is no doubt as to the applicability of said amendment to such state laws. The opinion of Mr. Justice HOLMES, in *Nixon* v. *Herndon, et al.* (1927), 273 U. S. 536, 71 L. ed. 759, adjudging a former Texas primary law which denied suffrage to Negroes, to be unconstitutional, was based exclusively upon the 14th Amendment.

That the State law in question and its administration, as disclosed by the record and already discussed in this brief, are flagrantly violative of said amendment, seems too

obvious to require further comment. When it is sought to apply the constitutional standard of said amendment to the law in question, and to the result it has produced in Wagoner County, the question is not whether the State of Oklahoma has afforded Lane and the other Negroes the equal protection of the laws: the serious inquiry suggested is, whether the state has afforded them *any protection* at all? The record herein discloses that under said Sec. 5654, O. S. 1931, the State of Oklahoma is, so far as the questions here involved are concerned, still applying and enforcing the law of 1857, in total disregard of the 14th Amendment; that it is giving full, positive effect to the *Dred Scott* dictum, following *Atwater* v. *Hassett*, *supra*, p. 33; and openly defying the opinion of Mr. Chief Justice WHITE in the *Guinn* case, *supra*.

This law, by its very terms, places every burden upon petitioner Lane, and others situated as he was; while as to the electors (all whites) who voted in 1914 no requirement is made. Lane is given only one ten-day period within which to qualify under the Registration Law; he must answer under oath "any question touching his qualifications as an elector". If Lane should vote without having registered according to said Registration Law, he would, under Sec. 5842, Vol. I, O. S. 1931, p. 1714, be guilty of a felony; and under Sec. 5844, Vol. I, O. S. 1931, p. 1714, would be disfranchised for ten years. While the white electors, who voted in the unlawful election of 1914, would, under similar circumstances, be guilty of no offense at all.

Under these circumstances, the refusal of registration is a denial of the right of suffrage. *Myers* v. *Anderson*, *supra*, p. 44; and petitioner Lane was not required to attempt to vote without being registered (and risk being convicted of a felony) in order to secure adjudication of his rights. *Terrace* v. *Thompson* (1923), 263 U. S. 197, 216,

68 L. ed. 255, 275. Moreover, Sec. 6 of Art. III, of Oklahoma Constitution (authorizing registration legislation: Vol. II, O. S. 1931, p. 1408, Sec. 13452, *supra*, p. 42) prohibits voting by one who is not registered; and the vote of an unregistered elector is void. *Munger, et al.* v. *Town of Watonga, et al.* (1925), 106 Okl. 78, 233 Pac. 212; see also, Sec. 5652, O. S. 1931 (Appendix hereto, p. 73).

Furthermore, as has been hereinbefore shown, said law requires petitioner Lane to register, while, in the manner in which the law is administered, it has been impossible for him, or any other Negro (excepting 2 in more than 20 years years, R., p. 36) to register. During all these years it appears that the white electors (qualified after 1916) were permitted freely to register, regardless of the technical provisions of Section 5654 (R., p. 74; See also, testimony of respondent Marion Parks, registrar, R., p. 49, *et seq.*).

Said Sec. 5654 imposes, in effect, upon petitioner Lane an arbitrary period of limitation of ten days within which to seek to remedy the wrongful refusal of registration. Those who voted in the illegal election of 1914, even though their votes were cast in violation of said illegal law, have preserved to them, conclusively, the right of suffrage, without any qualification or requirement whatever.

As hereinbefore shown, under Sec. 5654, petitioner was purportedly allowed a limitation period of only ten days within which to seek to remedy any wrongful denial of registration; the registration officer so offending was entitled to formal summons, and was allowed ten days within which to answer; and said registration official had the right of appeal from any possible order or decree in favor of petitioner. On the contrary, by Sec. 5661, Vol. I, O. S. 1931, p. 1651 (Appendix, p. 75), the county registrar is given an absolute, ar-

bitrary and capricious power, upon 48 hours informal notice, to strike the name of *any* elector from the register. The statute, in effect, expressly authorizes the county registrar to consider hearsay evidence. And there is no power, judicial or administrative, on this side of Judgment Day, to review or question such acts of said registrar.

The actual working of this unequal, unjust, oppressive law is not left to speculation or imagination: here we have it in actual operation. Consider the actual case conducted by the respondent, Jess Wilson, and instigated by the respondent Judge Moss, within two days after the institution of the instant action (R., p. 64-74). Here was John Moss, candidate for re-election, in actual control of the entire registration system in the county! He was acting as the legal adviser to the election officials (R., pp. 49, 48, 47); instructing them as to how to perform the duties of their respective offices (R., pp. 49, 46); and in this particular case instructing the county registrar as to whose names to strike from the register (R., p. 46). See record, page 72, where counsel was attempting to appear before the County Registrar on behalf of Negroes whose names were to be stricken from the register:

> "Mr. John Moss: Is that all you (counsel for Negro electors) appear for, for that reason?
>
> Mr. Chandler: Yes.
>
> Mr. John Moss: Then you (the county registrar) might excuse all of us and hear it."

And the county registrar, being under the complete domination of Judge Moss, did as he was ordered. By the same token, any corrupt candidate for public office could (or can), under this registration law, enter cahoots with the county registrar, and disfranchise, not only the Negro electors, but also all other electors who he knew would vote against him.

—by the very terms of this law, he could disfranchise the opposing candidate, or even the district judges themselves, and there would be no definite, known proceeding under this law by which anyone could complain. Of course, this is not due process of law: it is not equal protection of the laws. It is, on the other hand, corrupt politics, injustice, oppression, tyranny!

This state law, and the result it has produced, are clearly violative of said 14th Amendment:

Slaughter-House Cases (1873), 83 U. S., 16 Wall. 36, 21 L. ed. 394, opinion by Mr. Justice MILLER;

Strauder v. *W. Va.* (1880), 100 U. S. 303, 25 L. ed. 664, opinion by Mr. Justice STRONG;

Ex parte Va. (1880), 100 U. S. 339, 25 L. ed. 676, opinion by Mr. Justice STRONG;

In re: Tiburcio Parrott (C. C. D. Calif. 1880), 1 Fed. 481, opinion by J. SAWYER;

Neal v. *Delaware* (1881), 103 U. S. 370, 26 L. ed. 567, opinion by Mr. Justice HARLAN;

Yick Wo v. *Hopkins* (1886), 118 U. S. 356, 30 L. ed. 220, opinion by Mr. Justice MATTHEWS;

In re: Wo Lee (C. C. D. Calif. 1886), 26 Fed. 471, opinion by J. SAWYER;

Minnesota v. *Barber* (1890), 136 U. S. 313, 34 L. ed. 455, opinion by Mr. Justice HARLAN;

Buchanan v. *Warley* (1917), 245 U. S. 60, 62 L. ed. 149, opinion by Mr. Justice DAY;

Nixon v. *Herndon* (1927), 273 U. S. 536, 71 L. ed. 759, opinion by Mr. Justice HOLMES.

From a legal and constitutional point of view, the abovementioned *Yick Wo* v. *Hopkins* case is squarely in point, and the opinion of Mr. Justice MATTHEWS there, is controlling here.

PROPOSITION IV.

It appearing that petitioner Lane was duly qualified as an elector under Section 1 of Article III of Oklahoma Constitution (Vol. II, O. S. 1931, p. 1406, Sec. 13446; Appendix hereto, p. 76), but that pursuant to said Oklahoma Registration Law of 1916, as enforced by respondents, said petitioner was forbidden to register as an elector, though so duly qualified, and for said reason said Registration Law violated said provision of said state constitution; and alleged error to said effect was duly assigned in the Circuit Court of Appeals; and said Circuit Court of Appeals erred in holding said Registration Law to be valid and constitutional, without in any manner observing said issue so made under the state Constitution.

The above stated proposition raises, admittedly, a question of state law; but since this question arises in this cause, cognizable by the federal court, it is competent for the federal court to pass upon all questions involved, including state questions, where such questions have not been specifically passed upon by the Supreme Court of the State. *Guinn* v. *United States, supra* (1915), 238 U. S. 347, 59 L. ed. 1340; *Davis* v. *Wallace, supra* (1922), 257 U. S. 478, 66 L. ed. 325. Petitioner has been unable to ascertain that this particular question has ever been passed upon by the Supreme Court of the State of Oklahoma.

This proposition is based upon the contention of petitioner that the qualifications of an elector in the State of Oklahoma are those prescribed by Sec. 1, Article III, of the Oklahoma Constitution (quoted in the 2nd requested instruction below, R., p. 52; and quoted in Appendix to this brief at page 76); that said Sec. 5654, under the guise of regulating the registration of electors, is an unwarranted and unconstitutional (under state constitution) attempt by the

State Legislature to modify said constitutional requirements, and an actual destruction of the rights of an elector duly qualified under the terms of said constitutional provision.

This contention of petitioner seems sound, both in substance and upon legal principle. In this very case, although it is admitted (See Answer of respondent, R., p. 15) that petitioner possesses all of the constitutional qualifications of an elector, yet, on account of the terms and enforcement of said Sec. 5654, said petitioner is denied any of the rights, privileges, or immunities of a constitutionally qualified elector, and is denied any means of redress for the denial of the exercise of the privilege, or for violation of the right. Thus, as to petitioner, the constitutional definition of the qualifications of an elector is a mere nullity. Though duly qualified as an elector in 1934, he was denied registration under Sec. 5654. Such law cannot be defended as regulatory: for, in fact, it is more—it is confiscatory and destructive.

And on the other hand, as to the exemption from registration accorded by the said Sec. 5654 to those who voted in 1914, said statute is equally violative of said Sec. 1, of Article III, of the State Constitution. Such voters (who voted in 1914) have an absolute and incontestable right to vote in any election in the state. The last sentence of said Sec. 5654 is: "Provided further, that each county election board in this state shall furnish to each precinct election board in the respective counties a list of the voters who voted at the election in November, 1914, and such list *shall be conclusive evidence of the right of such person to vote.*" (Italics ours.) Thus, any person whose name may be found upon such list has an absolute, incontestable right today to vote (under Sec. 5654), though he actually possesses none of the qualifications prescribed by said Sec. 1, Article III

of the Constitution, and though he be tainted by each of the attributes of persons by the Constitution expressly forbidden to vote.

Petitioner knows of no presumption of fairness or regularity of operation which the court is bound to indulge in favor of an unconstitutional, void law. Very probably, persons who were not citizens, and also felons, convicts, paupers, idiots and lunatics actually voted in fulsome hordes in 1914, under the Grandfather Clause—under the terms of the Grandfather Law, every felon, pauper, and idiot in the state could vote who could prove that he was on "January 1, 1866 * * * entitled to vote", etc. No one can imagine all the wrongs and unlawful acts perpetrated under cover of that constitutional monstrosity known as the Grandfather Clause. Imagination is not necessary—just read the sordid narration in the opinion rendered in *Guinn* v. *United States* (C. C. A. 8, 1915), 228 Fed. 103, for a description of operation of the "state policy" sought to be perpetuated by the respondents. Yet by the effect of Sec. 5654, every alien, felon, idiot or lunatic who voted in 1914 under the Grandfather Law, whether in consonance with its spirit or contrary to its terms, is today duly qualified to vote, despite the requirements of said Sec. 1 of Article III, of the State Constitution.

And this practical quaere suggests itself: what was the need or reason for the special, necromantic 1916 registration in Wagoner County, if all those (obviously white) who voted in 1914 were exempted from registration; and all those who did not vote in 1914 (obviously, black) were denied registration?

The rule of law governing such a state statute is well settled. In Vol. 9, Ruling Case Law, commencing at page 1036, concerning Elections, it is stated:

"Sec. 52. *In General.* It is a general rule that, in the absence of constitutional inhibition the legislature may adopt registration laws if they merely regulate in a reasonable and uniform manner how the privilege of voting shall be exercised. It is true that the constitution by prescribing the qualifications of those who may vote confers upon persons coming within the class so created a right to vote which cannot be abridged by the legislature, and, therefore, the theory upon which registration laws may be supported is that they do not impair or abridge the electors' privilege but merely regulate its exercise by requiring evidence of the right. The fact that a constitutionally qualified voter may be prevented from voting through failure to comply with the law does not necessarily invalidate it, provided he be afforded a reasonable opportunity to register before the election. The requirement of registration does not add a new qualification, unless such voter is deprived of the right to prove himself to be an elector, or, as it has been held, is denied the right to register at any time prior to the closing of the polls on election day." (Citing):

State v. *Corner*, 22 Neb. 265, 34 N. W. 499, 3 A. S. R. 267;

White v. *Multnomah County*, 13 Ore. 317, 10 Pac. 484, 54 Am. Rep. 843;

Dells v. *Kennedy*, 49 Wis. 555, 6 N. W. 246, 381, 35 Am. Rep. 786;

Notes: 7 L. R. A. 99; Ann. Cas. 1913B 25.

* * * * * * *

"Sec. 53. *Essentials of a valid Registration Law.* A registration law will not be held valid which under the color of regulating the manner of voting, really subverts the right, for a law of this description must be reasonable, uniform and impartial, and must be calculated to facilitate and secure, rather than impede, the exercise of the right. If, for instance, it prescribes a qualification for the elector in addition to those pro-

vided by the constitution, or prescribes regulations so unreasonable and restrictive as to exclude a large number of legal voters from exercising their franchise, it will be declared invalid." Citing: *Brewer* v. *McClelland*, 144 Ind. 423, 32 N. E. 299, 17 L. R. A. 845; *Edmonds* v. *Banbury*, 28 Ia. 267, 4 Am. Rep. 177; *Owensboro* v. *Hickman*, 90 Ky. 629, 14 S. W. 688, 10 L. R. A. 224; *Capen* v. *Foster*, 12 Pick. (Mass.) 845, 23 Am. Dec. 632 and note (cited by Mr. Justice MATTHEWS in *Yick Wo-Hopkins, supra)*; *Atty. General* v. *Detroit*, 78 Mich. 545, 44 N. W. 388, 18 A. S. R. 458, 7 L. R. A. 99; *State* v. *Corner*, 22 Neb. 265, 34 N. W. 499, 3 A. S. R. 267; *State* v. *Board, etc.*, 21 Nev. 67, 24 Pac. 614, 9 L. R. A. 385; *Daggett* v. *Hudson*, 43 Ohio 548, 3 N. E. 538, 54 Am. Rep. 832 (cited by Mr. Justice MATTHEWS in opinion in *Yick Wo-Hopkins, supra)*; *Page* v. *Allen*, 58 Pa. St. 338, 98 Am. Dec. 272; Notes: 28 A. S. R. 260, Ann. Cas. 1913B, 19, *et seq.*"

* * * * * * *

"Sec. 54. *Registration Laws Under Constitutional Provisions.* * * * Where the constitution directs that the legislature shall provide for the registration of all persons entitled to vote, *the mandate is an implied prohibition against providing for the registration of any class or for only a part of the voters.* The qualifications of voters must be uniform. One voter must possess the same as another and he need possess no more. And even without such provision it seems clear that a registration law in order to be valid must be uniform in its operation. Hence, a law which requires one person to be registered in order to be entitled to vote, while it permits another person to vote without being registered, is void." *(Morris* v. *Powell*, 125 Ind. 281, 25 N. E. 221, 92 L. R. A. 326.)

* * * * * * *

"The fact that the legislature is expressly authorized to enact registration laws does not affect the rule heretofore laid down that such a law shall not

under pretense of regulation preclude or hinder any one from the exercise of his right of franchise." Citing: *Pope* v. *Williams*, 98 Md. 59, 56 Atl. 543, 103 A. S. R. 379, 66 L. R. A. 398; *People* v. *Canady*, 73 N. C. 198, 21 Am. Rep. 465."

The third syllabus of the above cited case of *Atty. Gen.* v. *City of Detroit* (1889), 78 Mich. 545, 44 N. W. 388, is as follows:

"The act is unreasonable and void because it provides for but five registration days during the year, at one of which the elector must make personal application for registration; thus disfranchising persons who are ill or absent on registration days, but who would be able to vote on election days."

In said Michigan case the registration law was declared to be void because it provided for only five registration days during the entire year. *A fortiori*, this Oklahoma statute, which provides for only one ten-day registration period during the entire lifetime of the elector (and that, in 1916), is unreasonable and void.

The third syllabus of the case of *McCafferty* v. *Guyer, et al.* (1868), 59 Pa. St. 109, is in the following words:

"The 3rd Article of the Constitution is not merely a general provision defining the indispensable requisites to the rights of an elector, leaving the legislature to determine who may be excluded. It is a description of who shall not be excluded.

"The Act of June 4th, 1866 [for disfranchising deserters] is unconstitutional."

And in the case of *Monroe, et al.* v. *Collins* (1866), 17 Ohio St. 665, opinion by Justice WELCH, the law is stated in the second syllabus, thus:

"The legislature have no power, directly or indirectly, to deny or abridge the constitutional right of

citizens to vote, or unnecessarily to impede its exercise; and laws passed professedly to regulate its exercise or prevent its abuse must be reasonable, uniform, and impartial."

This last cited case, to-wit, *Monroe* v. *Collins*, quoted from above, is especially significant here because in said case the Legislature of the State of Ohio, even before the adoption of the 14th and 15th Amendments to the Constitution of the United States, attempted, by a registration law, to deny to Negroes the right of suffrage; and said case is entitled to very serious consideration because it was cited, with pointed approval, by Mr. Justice MATTHEWS, speaking for the Supreme Court of the United States, in the case of *Yick Wo* v. *Hopkins* (1886), 118 U. S. 356, 30 L. ed. 220.

Concerning the specific question as to the constitutionality of such a registration law as is here under judicial scrutiny, the law is stated by Cooley's Constitutional Limitations, 8th Edition, 1927, Vol. 2, at p. 1370:

> "All regulations of the elective franchise, however, must be reasonable, uniform, and impartial; they must not have for their purpose directly or indirectly to deny or abridge the constitutional right of citizens to vote, or unnecessarily to impede its exercise; if they do, they must be declared void." Citing: *Capen* v. *Foster*, 12 Pick. 485, 23 Am. Dec. 632; *Monroe* v. *Collins*, 17 Oh. St. 665; *Kineen* v. *Wells* (Sup. Jud. Ct. of Mass. 1887), 144 Mass. 497, 11 N. E. 916, and other cases.

In the above cited case of *Kineen* v. *Wells, et al.*, relied upon by Mr. Cooley, there was held to be unconstitutional and void a registration statute of the State of Massachusetts which provided that "no person hereafter naturalized in any court shall be entitled to be registered as a voter *within thirty days of such naturalization.*" In said case,

an order of the trial court sustaining demurrer to a petition for damages against registration officers for enforcing said statutes as against a newly naturalized citizen, was reversed for the reason, as stated by Justice DEVENS, such registration law was in conflict with the right of an elector, duly qualified under the Constitution of the State of Massachusetts.

The above stated proposition was properly assigned, specified, and presented to the Circuit Court of Appeals below, but the opinion of said court wholly ignored same.

PROPOSITION V.

Upon the trial there was adduced abundant evidence of a conspiracy between and among the respondents, acting pursuant to said state laws, in the deprivation from petitioner of his rights under the Constitution and laws of the United States; and said Circuit Court of Appeals committed error in holding and adjudging that there was no conspiracy, said question being properly determinable by a jury, and not by the court; and in so doing the Circuit Court of Appeals violated the 7th Amendment.

In the trial court, this case was tried to a jury, where a verdict was instructed in favor of respondents (R., p. 61). There was abundant evidence to prove, nor was it controverted, that petitioner Lane possessed all the qualifications of an elector as prescribed by Sec. 1, Art. III, of the Oklahoma Constitution. It is not controverted that petitioner made application for registration, at the proper time, and that he was refused registration. There was, further, evidence to the effect that said refusal was on account of his race and color (R., p. 29). It is admitted that, in denying petitioner registration, respondents were enforcing, and acting under color of the state statutes the constitutionality of which is at issue.

It was charged in the petition filed in the trial court that in refusing registration to petitioner and to other Negroes the respondents were acting pursuant to a conspiracy (R., p. 5). During trial there was introduced evidence to prove: that during the registration period of 1916, the special registration provided the registration law, there were registered in Wagoner County 11 Negro electors; that during the next ten years not a single Negro elector was registered in said county; that in each of 1926 and 1928 there was registered 1 Negro; that from 1928 down to 1934 there was not a single Negro registered in said county (R., p. 36). It further appeared, and was not controverted, that approximately 30 percent of the population of the county were Negroes (R., p. 38). It was further proved that petitioner Lane had voted in Alabama, and in Oklahoma in 1910 and 1912, but that he could not vote in 1914 on account of the Grandfather Clause, and that he had never been able to register, although he had tried to register during every registration period since 1914 (R., p. 27-28).

While, in this controversy, the identity of the precinct registrar in 1916 appeared immaterial, the opinion of the Circuit Court of Appeals recited that it seemed to be "*conclusively established* by proof that one Workman was not precinct registrar in 1916" (R., p. 100). There was conflicting evidence as to the identity of the precinct registrar in 1916, and the question before the trial court, as well as the Circuit Court of Appeals, was not whether said Workman was the precinct registrar, but whether there was evidence to submit to the jury as to who was such registrar.

In the manner in which registrations are conducted in said county, it seems quite difficult, if not impossible, to determine just who is the registrar—from the evidence it appeared quite clearly that the precinct registrars made a general game of "hide-and-go-seek" with Negro electors

seeking registration; and this appears, not only from evidence of petitioner, but also from evidence of respondents. Their witness Atterberry testified that he was registrar for part of a registration period, and that the registration books were sent to him, but that he refused to serve (R., p. 43).

The respondent, Jess Wilson, county registrar, testified that he had appointed one Carl Lawrence, who had resigned; and that during part of the registration period of 1934 there was no precinct registrar (R., p. 45). Wilson advised petitioner Lane that the precinct registrar would be one Benny Harman, but said Wilson, county registrar, actually appointed respondent Parks as precinct registrar (R., p. 45).

Respondent Wilson testified that he appointed one Goddard as precinct registrar, said appointment being "just by oral agreement" (R., p. 46). There was not introduced in evidence any authentic record to identify any precinct registrar at any time—it seems that no such record existed. Under these circumstances, the mere fact that James L. Pace issued some registration certificates during 1916 is by no means conclusive—as the Circuit Court of Appeals held—that Workman, to whom petitioner applied, as he testified, was not precinct registrar during any part of said period. At best, it was a question of fact for the jury.

The opinion of the Circuit Court of Appeals to effect that there was no proof of a conspiracy seems to be patently erroneous: there was evidence that respondent Parks stated to petitioner that Judge Moss and Jess Wilson had instructed him not to register colored people (R., p. 33); respondent Wilson testified that he advised Parks that respondent Moss would instruct him regarding the election

laws (R., p. 46); respondent John Moss admitted instructing Parks about the registration law; and reading to Parks, as a statement of the law, a certain letter he had received which construed the law as contended by respondents (R., p. 48). After the precinct registrar Goddard had registered 50 Negroes, respondent Judge John Moss was one of the petitioners to have the names of said Negro electors stricken from the record (R., p. 64-65); and when said matter came on for hearing before the county registrar, respondent Wilson, sitting as a supreme judge and from whose edict there was no appeal, it was clear that Wilson was acting under instructions from Judge John Moss; and at the suggestion of Moss, Wilson excluded from the hearing counsel attempting to represent said Negro electors whose names were to be stricken (R., p. 72). At that very time Moss was a candidate for public office! There was abundant evidence of a conspiracy—surely enough to be submitted to a jury.

The opinion of the Circuit Court of Appeals recited, "There was proof that but few Negroes were registered in proportion to their population, but no proof of the number of qualified electors who applied and were refused" (R., p. 100). There was abundant proof that all who applied were refused; and there was further proof that all 50 names of those who were registered in 1934 were stricken from the register, and in an inquisitorial proceeding which was a disgrace to the state. Furthermore, it was sufficient for petitioner to prove that *he* was duly qualified and illegally denied the right to register. *State of Missouri, ex rel. Gaines* v. *Canada, etc., et al.* (Dec. 12, 1938, No. 57); . . . U. S. . . ., . . . L. ed. . . .

In disposing of said cause, the Circuit Court of Appeals undertook to determine the ultimate facts from conflicting evidence, and in so doing said court violated the 7th Amendment to the Constitution of the United States,

which guarantees the right to trial by jury; and the opinion and judgment of said Circuit Court of Appeals, usurping the function of jury, was erroneous.

—*Slocum v. N. Y. Life Insurance Co.* (1912), 228 U. S. 364, 57 L. ed. 879, at p. 887.

CONCLUSION.

Finally, it appears that in this cause the United States Circuit Court of Appeals for the Tenth Circuit has failed to observe Article VI of the Federal Constitution; it has usurped the function of jury and violated the Seventh Amendment; refused to consider the 14th Amendment; approved the flagrant violation of the 15th Amendment; and has ignored the applicable, controlling decisions of this Honorable Court. Further, that its judgment is erroneous, unjust and contrary to law.

Wherefore, petitioner respectfully prays that the said judgment of said Circuit Court of Appeals herein be reversed; and that this Honorable Court cause justice to be done between the parties according to law.

Respectfully submitted this 20th day of January, A. D. 1939.

I. W. LANE,
Petitioner,

By CHARLES A. CHANDLER,
His Counsel.

APPENDIX.

ARTICLE VI, UNITED STATES CONSTITUTION (Vol. II, O. S. 1931, p. 1608):

"Article VI.

* * * * * * *

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * * * * * *"

7TH AMENDMENT, UNITED STATES CONSTITUTION (Vol. II, O. S. 1931, p. 1611):

"In suits at Common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

FOURTEENTH AMENDMENT TO CONSTITUTION OF UNITED STATES (Vol. II, O. S. 1931, p. 1613):

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * * * *

"Section 5. The Congress shall have power to enforce by appropriate legislation, the provisions of this article."

FIFTEENTH AMENDMENT TO CONSTITUTION OF UNITED STATES (Vol. II, U. S. 1931, p. 1614):

"Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

"Section 2. The Congress shall have power to enforce this Article by appropriate legislation."

UNITED STATES CODE, TITLE 8—CHAPTER 2—ELECTIVE FRANCHISE.

"Section 31. *Race, Color, or Previous Condition Not to Affect Right to Vote.*—All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding." (R. S., Sec. 2004).

UNITED STATES CODE, TITLE 8—CHAPTER 3—CIVIL RIGHTS.

"Section 43. *Civil Action for Deprivation of Rights.* Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (R. S., Sec. 1979).

Title 28, U. S. C., Sec. 41 (Mason Code, Vol. 2, p. 1972):

"Section 41. Judicial Code, Section 24, Amended.) *Original Juricdiction.*—The district courts shall have original jurisdiction as follows:

"(1) United States as plaintiff; civil suits at common law or in equity.—First. Of all suits of a civil nature, at common law or in equity, * * * or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States, * * *. The foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section. (R. S. Secs. 563, 629; Mar. 3, 1875, c. 137, Sec. 1, 18 Stat. 470; Mar. 3, 1887, c. 373, Sec. 1, 24 Stat. 552; Aug. 13, 1888, c. 866, Sec. 1, 25 Stat. 433; Mar. 3, 1911, c. 231, Sec. 24. 36 Stat. 1091.)"

Title 28, U. S. C., Sec. 41, Subdivision (14) (Vol. 2, Mason, p. 1991, defining jurisdiction of District Courts):

* * * * * * *

"(14) Suits to redress derprivation of civil rights.—Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States. (R. S., Sec. 563, par. 12, Sec. 629, par. 16; Mar. 3, 1911, c. 231, Sec. 24, par. 14, 36 Stat. 1092.)"

(Vol. I, O. S. 1931, p. 1646, Sec. 5652) *Registration Mandatory.*

"It shall be the duty of every qualified elector in this state to register as an elector under the provisions of this Act, and no elector shall be permitted to vote at any election unless he shall register as herein provided, and no elector shall be permitted to vote in any primary election of any political party except of the political party of which his registration certificate shows him to be a member."

(Vol. I, O. S. 1931, p. 1646, Sec. 5654) *Time for Registration—Absentees—Appeals.*

"It shall be the duty of the precinct registrar to register each qualified elector of his election precinct who makes application between the thirtieth day of April, 1916, and the eleventh day of May, 1916, and such person applying shall at the time he applies to register be a qualified elector in such precinct and he shall comply with the provisions of this act, and it shall be the duty of every qualified elector to register within such time; provided, if any elector should be absent from the county of his residence during such period of time, or is prevented by sickness or unavoidable misfortune from registering with the precinct registrar within such time, he may register with such precinct registrar at any time after the tenth day of May, 1916, up to and including the thirtieth day of June, 1916, but the precinct registrar shall register no person under this provision unless he be satisfied that such person was absent from the county or was prevented from registering by sickness or unavoidable misfortune, as hereinbefore provided. And provided that it shall be the mandatory duty of every precinct registrar to issue registration certificates to every qualified elector who voted at the general election held in this state on the first Tuesday after the first Monday in November, 1914, without the application of said elector for registration, and, to deliver such certificate to such elector if he is still a qualified elector in such precinct and the failure to so register such elector who voted in such election held in November, 1914, shall not preclude or prevent such elector from voting in any election in this state; and provided further, that wherever any elector is refused registration by any registration officer such action may be reviewed by the district court of the county by the aggrieved elector by his filing within ten days a petition with the Clerk of said court, whereupon summons shall be issued to said registrar requiring him to answer within ten days, and the district court shall be a expeditious hearing and from his judgment an appeal will lie at the instance of either party to the Supreme Court of the State as in civil cases; and provided further, that the provisions of this act shall not apply to any school district elections. Provided further, that each county election board in this state shall furnish to each precinct election board in the respective counties a list of the voters who voted at the election in November,

1914, and such list shall be conclusive evidence of the right of such person to vote."

(Vol. I, O. S. 1931, p. 1651, Sec. 5661) *Illegal Registration—Cancellation—Procedure:*

"If two or more electors of any county have reason to believe that a name appearing upon the county registration book is illegally registered, they may apply in writing to the county registrar of such county to have such name stricken from the county registration book. Such applications shall not be made later than the Tuesday preceding any election, and shall be accompanied by an affidavit signed by one or more of such electors, setting forth their reason for believing that such name is illegally registered. Said county registrar shall forthwith consider said application and, if he shall determine from said affidavit or other evidence that there is reasonable ground for believing that such name is illegally registered, he shall forthwith cause notice of such application to be served upon the person, the registration of whose name is attacked, which service shall be made by serving a copy of the notice on said person, or if he be not found, then by leaving a copy thereof at the place which appears from the registration book to be his residence. Said notice shall briefly state the substance of the said application and shall order such person to appear before the county registrar in the court house of said county at an hour to be named therein which shall be at least 48 hours after the service of such notice. Return of the service of said notice by the sheriff shall be made within 48 hours. At the hour named for the appearance of such person the said county registrar shall proceed to investigate whether or not such name is illegally registered. Witnesses may be summoned in the usual way to testify in regard thereto, and may be sworn by said county registrar. If the county registrar shall find that said name is illegally or falsely registered he shall order such name to be stricken from the county registration book and so certify to the county clerk, and it shall be the duty of the county clerk upon the receipt of said certificate to strike said name from the county registration book and certify to the precinct registrar of the precinct in which such name was re-

istered that such name has been stricken from the county registration book by him pursuant to the order of the county registrar, and shall direct said precinct registrar to strike said name from the precinct registration book in his possession and upon receipt of said certificate from the county clerk it shall be the duty of the precinct registrar to strike said name from the precinct registration book in his possession. If the person whose name is sought to be stricken from the county registration book is not personally served with a copy of the notice hereinbefore provided, or has not entered his appearance before the county registrar, he shall have the right to apply to said county registrar at any time before six o'clock P. M. on the third day before the holding of any election to have said finding and certificate of the county registrar set aside, and if upon the hearing of said application the said county registrar shall not be of the opinion that his name was illegally registered he shall set aside said finding and certificate and shall certify to the county clerk that his findings has been set aside and direct the county clerk to reinstate his name on the county registration book, and the county clerk shall immediately upon receipt of such certificate so reinstate his name on the county registration book, and the county clerk shall immediately certify the same to the precinct registrar of the precinct in which said person was registered and direct said registrar to reinstate his name on the precinct registration book, and the precinct registrar shall immediately so reinstate his name on the precinct registration book."

OKLAHOMA CONSTITUTION, ARTICLE III, SUFFRAGE (Vol. II, O. S. 1931, p. 1406, Sec. 13446):

"*Electors—Qualifications—Felons—Paupers.* Section 1. The qualified electors of this State shall be citizens of the United States, citizens of the State, including persons of Indian descent (native of the United States), who are over the age of twenty-one years, and who have resided in the State one year, in the County six months, and in the election precinct thirty days, next preceding the election at which such elector offers to vote. Provided, that no person adjudged guilty of a felony, subject to such exceptions

as the Legislature may prescribe, nor any person, kept in a poorhouse at public expense, except Federal, Confederate and Spanish-American ex-soldiers or sailors, nor any person in a public prison, nor any idiot or lunatic, shall be entitled to register and vote."

OKLAHOMA CONSTITUTION, ARTICLE III, PRIMARY ELECTIONS (Vol. II, O. S. 1931, p. 1407, Sec. 13450) *Grandfather Clause.*

"Section 4a. No person shall be registered as an elector of this State, or be allowed to vote in any election held herein, unless he be able to read and write any section of the Constitution of the State of Oklahoma; but no person who was, on January 1st, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendent of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such Constitution.

Precinct election inspectors having in charge the registration of electors shall enforce the provisions of this section at the time of registration, provided registration be required. Should registration be dispensed with, the provisions of this section shall be enforced by the precinct election officers when electors apply for ballots to vote."

(Amendment, initiated by the people and adopted at an election held August 2, 1910. The Governor's Proclamation announcing the result, was issued October 6, 1910.)

OKLAHOMA CONSTITUTION, FEDERAL RELATIONS, ARTICLE I (Vol. II, O. S. 1931, p. 1386, Sec. 13411) *Suffrage:*

"Sec. 6. The State shall never enact any law restricting or abridging the right of suffrage on account of race, color, or previous condition of servitude."